

O4HBFRO1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 FRONTIER AIRLINES, INC.,

4 Plaintiff,

5 v.

20 Civ. 9713 (LLS)

6 AMCK AVIATION HOLDINGS IRELAND
7 LIMITED, ACCIPITER INVESTMENT
8 4 LIMITED, VERMILLION AVIATION
(TWO) LIMITED,

9 Defendants.

10 Bench Trial

11 New York, N.Y.
12 April 17, 2024
11:00 a.m.

13 Before:

14 HON. LOUIS L. STANTON,

15 District Judge

16 APPEARANCES

17 LANE POWELL PC
Attorneys for Plaintiff
18 BY: DAVID G. HOSENPUD
AARON SCHAER

19 CLIFFORD CHANCE US LLP
Attorneys for Defendants
20 BY: JEFF E. BUTLER
21 JOHN P. ALEXANDER
22 RISHIKA JIKARIA
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Sheridan- Cross

1 (Trial resumed)

2 THE COURT: Good morning, Mr. Sheridan. You're
3 reminded you're still under oath.

4 THE WITNESS: Good morning. Okay.

5 PAUL SHERIDAN,

6 CROSS-EXAMINATION CONTINUED

7 BY MR. HOSENPUD:

8 Q. Good morning, Mr. Sheridan. I want to touch on a few
9 things from yesterday.

10 Isn't it true that you do not recall and testified
11 what your response was to Mr. Dempsey's request for a month to
12 month.

13 A. That's correct.

14 Q. And you don't recall telling Mr. Dempsey that a written
15 agreement for a month to month would be entered, correct?

16 A. That's correct.

17 Q. And you never told Mr. Dempsey in this phone call that you
18 lack the authority as chief executive to grant a month to
19 month, correct?

20 A. Correct.

21 Q. Now, you communicated to Mr. Ma about this, and he approved
22 a month to month, correct?

23 A. Correct.

24 Q. And you never told Mr. Dempsey of Gerald Ma's approval,
25 correct?

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Sheridan- Cross

1 A. Correct.

2 Q. Let's look at exhibit 84, please.

3 You were questioned yesterday, Mr. Sheridan, about
4 this exhibit and asked about Mr. Ma's first reaction, correct?

5 A. Correct.

6 Q. And you understood that to be that rents had to be paid in
7 full before the first delivery; isn't that correct?

8 A. Correct.

9 Q. And that was a consistent message that you had conveyed or
10 Ms. O'Callaghan had conveyed to Frontier, correct?

11 A. That's correct.

12 Q. Let's now look at Joint Exhibit 85. You were shown Joint
13 Exhibit 85 yesterday, and I'd like to just scroll down to
14 orient you, sir.

15 This is Mr. Dempsey's communication to you on April
16 13, 2020, correct?

17 A. Correct.

18 Q. And in it he's updating you that Airbus was willing to move
19 two aircraft in the short-term, two month in the short-term,
20 first aircraft in June, next two in July; is that right?

21 A. That's correct.

22 Q. And this is when you knew at this point that there would be
23 no May delivery, this is April 13, 2020, correct?

24 A. Correct.

25 Q. And he had sent you a text over Saturday indicating the

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Sheridan- Cross

1 same information, which was April 11; is that right?

2 A. That's right.

3 Q. Your response is listed above in the email chain. You
4 apologize for the delay, and you state, Essentially we want to
5 tie the deliveries to having no outstanding deferrals, so it
6 would only work if we recast the deferral agreement. You see
7 that reference?

8 A. Yes.

9 Q. I'm sorry, sir?

10 A. Yes, I see that, yes.

11 Q. Thank you. And that is your effort to make consistent the
12 delivery deferral and repayment period, but you never sent
13 anything to Frontier in writing to match the delivery time of
14 the next aircraft, did you?

15 A. We never updated the deferral, the draft deferral agreement
16 that we had previously sent that had the longer repayment
17 period, no.

18 Q. Right. Because that repayment period was no longer
19 applicable given that AMCK wanted Frontier to be current with
20 the next delivery, correct?

21 A. Correct.

22 Q. I'd like to move forward to another point that you
23 discussed on direct examination. We're going to look at
24 exhibit 101. Let's scroll down to the email I'm focusing on in
25 the section of exhibit 101, page one.

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Sheridan- Cross

1 You stated that one thing was clear, on thing that was
2 clear, the directors didn't want to answer the question of what
3 happens if Frontier gets current on all rent and we come up to
4 a delivery.

5 Isn't it true, sir, that they never answered the
6 question, and that is why you were making that observation?

7 A. I don't recall how the discussion went at the board
8 meeting, but I think nobody wanted to make a decision on what
9 would happen if Frontier had paid the overdue rents at that
10 point.

11 Q. You say they're overdue at that point, but did you say they
12 were overdue in this email?

13 A. I didn't, but it was the 22nd of April, so we would have
14 known they were overdue at that point.

15 Q. Did you say anything to Frontier that the rents were
16 overdue at that point?

17 A. No.

18 Q. Let's look at exhibit 100. These are the minutes that you
19 chaired on April 22, 2020; is that correct?

20 A. That's correct.

21 Q. Turning to paragraph 7.13. There's a reference relating to
22 you, the chairman. You were chairing the meeting, correct?

23 A. Correct.

24 Q. The chairman advised that it was intended to revert to the
25 airlines and renegotiate as to whether deliveries needed to

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Sheridan- Cross

1 take place during the period of rent deferrals; correct?

2 A. That's what it says, yes.

3 Q. And you were still in negotiation with Frontier, correct?

4 A. Correct.

5 Q. And Frontier, as you knew, was still in negotiation with
6 Airbus, weren't they?

7 A. Yes, correct.

8 Q. Let's go back to 101, please. I'm focusing your attention,
9 sir, on the second paragraph of this email exchange at the top.
10 And this is Ms. O'Callaghan telling you that it would be better
11 to tell Frontier that AMCK cannot get the shareholder
12 comfortable with funding at 2019 contracted pricing, even if
13 they are completely current on all payments. You see that
14 reference?

15 A. I do.

16 Q. You never authorized her to do so, did you?

17 A. I don't think I did, no.

18 Q. And you knew that if Frontier had any inclination about
19 AMCK's position, it would have paid rent, correct?

20 A. I think it's likely, but we didn't know what their mindset
21 was at that point.

22 Q. Right. But if they knew that even if they were current the
23 shareholder was not agreeable to funding these aircraft --

24 A. No.

25 Q. Just a minute, sir. -- do you have any doubt in your mind

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Sheridan- Cross

1 that Frontier would have made payment?

2 A. Well, I would just not characterize it that I knew that the
3 shareholder would not fund. But if there was a warning of it,
4 I would imagine they wouldn't make payments of the overdue
5 rent, yes.

6 Q. Let's move on. We're going to look at exhibit 111.

7 Mr. Sheridan, I'm focusing your attention on the April 27 email
8 from Mr. Dempsey in the center of the front page of this
9 exhibit where he says to you he's been briefed by Robert and
10 was working on the assumption that we had to be current on all
11 rent for you to finance the upcoming deliveries. And that is
12 consistent with AMCK's position as of April 27, correct?

13 A. That is correct. I would say when you see some of these --
14 the term "current" can mean a lot of things. And so really
15 what we wanted was no deferred rent and no overdue rents.

16 Q. And he's pointing out to your email below, which the idea
17 was to tie the outstanding deliveries to having no outstanding
18 deferrals of rent, so it would only work if we recast the
19 deferral agreement; isn't that right?

20 A. That's right.

21 Q. So the subject matter in your understanding and in
22 Mr. Dempsey's understanding was being current with rent before
23 the next delivery and funding would ensue?

24 A. Well, I think having no outstanding deferrals at the
25 delivery, being current in terms of not having any overdue rent

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Sheridan- Cross

1 is a given.

2 Q. No outstanding deferrals and being current on rent, that's
3 how you constructed this message to Mr. Dempsey, isn't it?

4 A. I would say that I constructed the message to say no
5 outstanding deferrals at the time.

6 Q. And then it says the six-month period was set to allow for
7 repayments of deferred rent as to be over the deferral period.
8 That's what you say in your April 13 email, correct?

9 A. Correct, the six-month period in the deferral agreement
10 that we had sent.

11 Q. The six-month period in the ask that you had made?

12 A. Yes. Sorry, excuse me, yes.

13 Q. So there's an integrated linkage between being current on
14 the rent deferrals at the time of the first delivery, that's
15 all we're talking about here, isn't it?

16 A. I would say that there's a linkage in agreed deferrals of
17 rent and the delivery. Overdue rent are a separate category.

18 Q. You mentioned nothing about overdue rent, did you?

19 A. I did not.

20 Q. You didn't tell Mr. Dempsey that there was rent due on the
21 27th, did you?

22 A. On the 27th, no, I did not.

23 Q. And nobody from AMCK did so, did they?

24 A. No.

25 Q. Let's turn now to exhibit 121, please. All right.

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Sheridan- Cross

1 Mr. Sheridan, you were asked some questions about exhibit 121
2 yesterday. This is an email from you to Gerald Ma dated April
3 30, 2020. You see that?

4 A. I do.

5 Q. And you are reflecting to Mr. Ma that Frontier responded
6 today as follows: They understand they must be current on all
7 payments at and beyond closing. They will immediately pay
8 outstanding April rents on which we agreed an informal deferral
9 pending agreement with Airbus on delivery delays.

10 Do you see that language?

11 A. I do.

12 Q. And the language that is yours in this communication is the
13 language, On which we agreed an informal deferral pending
14 agreement with Airbus on delivery delays, correct?

15 A. That's what it says.

16 Q. And yesterday I believe you testified that that language
17 meant the ten day April 6 deferral?

18 A. Yes, correct.

19 Q. You don't say that here, do you?

20 A. I don't.

21 Q. And your language is tied to having a pending agreement
22 with Airbus on delivery delays, correct?

23 A. That's correct.

24 Q. And to your knowledge there was no pending agreement at
25 that time, was there?

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Sheridan- Cross

1 A. At the time we knew that the discussions had only gone to a
2 point of having the give or take two-month delay of delivery.

3 Q. You knew that the discussions were still ongoing, did you
4 not?

5 A. I don't remember by the 30th of April if any of the
6 discussions were still ongoing, but at that stage we were still
7 just talking about whether we would accept the proposed
8 deliveries of July 2020 as discussed here.

9 Q. Let's look at point three, sir. It says, They will swap
10 our last two deliveries in September, Sept and Oct 2020 to
11 February 2021 with another lessor, or they will get Airbus to
12 agree to pushout, not a hundred percent clear. That's what you
13 said at that time, correct?

14 A. Correct.

15 Q. And so you knew the negotiations were ongoing with Airbus
16 to satisfy the condition of AMCK to push aircraft deliveries as
17 far out as possible?

18 A. Yes, I can accept that is correct.

19 Q. Now, going back up to item one where we were.

20 At no time did you ask Frontier to pay rent when they
21 told you they would immediately pay all outstanding April
22 rents, correct?

23 A. That's correct.

24 Q. Now, up above this Mr. Ma is saying, Can you confirm this
25 is their firm offer. Do you see that reference?

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Sheridan- Cross

1 A. Yes.

2 Q. And he ask, Nothing else, no extension and compensation or
3 penalty to them if they're overdue again. And then in all
4 caps, Is this the best we can do. All caps again, We only have
5 one shot at this. You see that reference?

6 A. Yes.

7 Q. Typically in your experience in communicating by email are
8 all capital statements kind of like screaming or yelling?

9 A. Typically, although Mr. Ma did use them reasonably
10 regularly. Not that he was screaming reasonably regularly, but
11 that he use them for emphasis.

12 Q. Now, isn't it true you also ultimately confirmed that this
13 was the firm offer from Frontier to Mr. Ma, correct?

14 A. I don't recall that. If you can show me an email that says
15 it.

16 Q. Didn't you testify in your deposition to that effect?

17 A. I don't recall. You'd have to show me. If I did, I can
18 accept it.

19 Q. We'll go back to that. Before responding to Mr. Ma, isn't
20 it true that Jane O'Callaghan had an email exchange with you on
21 April 30 relating to Frontier Airlines' proposal that is
22 reflected in exhibit 121?

23 A. Yes, that's correct.

24 Q. And isn't it true that Ms. O'Callaghan tells you in that
25 email exchange that she believes the Frontier proposal is final

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1 and firm and AMCK has to go with it?

2 A. I think you have to show me that email. I don't recall.

3 Q. You don't have a memory at this point?

4 A. Not of that specific email, no.

5 MR. HOSENPUD: May I approach the clerk, your Honor?
6 Your Honor, I would like to know if we have permission to
7 publish? We can do so. We have it.

8 THE COURT: Thank you. Is this a joint exhibit?

9 MR. HOSENPUD: It is not, your Honor.

10 THE COURT: Very well. It is received. You can
11 publish it.

12 MR. HOSENPUD: Will you please publish plaintiff
13 exhibit 11.

14 (Plaintiff's Exhibit 11 received in evidence)

15 BY MR. HOSENPUD:

16 Q. Let's look at this. Ms. O'Callaghan on April 30, 2020 is
17 indicating to you that the discussions had been going on for
18 two weeks, and that she believed, she do believe this is their
19 final and firm position and states, I think we have to go with
20 it. Does that refresh your recollection?

21 A. I don't recall the email, but I can see that is what it
22 says, yes.

23 Q. Then she goes onto discuss the downside if AMCK notifies
24 Frontier that AMCK cannot do the next three deliveries in July
25 because you can't get your shareholder on board. You see that

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1 reference?

2 A. Yes, I do.

3 Q. And she starts to itemize the consequences. Do they sue us
4 for breach of contract? You see that reference?

5 A. Yes.

6 Q. This could prove a terrible distraction and waste of
7 internal resources if they do, and I suspect they will. You
8 see that reference?

9 A. Yes, I do.

10 Q. Isn't it true that at that time you were aware that if
11 Frontier paid its rent and AMCK did not show up for the next
12 three deliveries, Frontier would likely sue?

13 A. Yes.

14 Q. Now, let me take you to your deposition to close the loop
15 on the question if you in fact notified Mr. Ma that this was
16 their firm position. I'll do it this way if this helps. And,
17 counsel, I'll tell you the page and line I'm on. We've got it
18 up electronically, and I'm turning to page 156.

19 Were you asked this question and gave this answer at
20 page 156, line six: I'm going back to the prior exhibit where
21 Mr. Ma had asked you to confirm if this was a firm offer from
22 Frontier, and you thought you probably had done so in a phone
23 call.

24 Answer yeah.

25 Does that give you reference? Yes. Did you give that

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Sheridan- Cross

1 answer at your deposition?

2 A. Yes, I did.

3 Q. So you notified Mr. Ma that you believed in answering his
4 question in the email chain, you believed this was a firm
5 offer?

6 A. Yes.

7 Q. And in connection with this phone call, isn't it true that
8 Mr. Ma suggested to you that immediate payment eliminating
9 outstanding April rent would obligate AMCK Aviation to move
10 ahead with the Framework Agreement?

11 A. I can imagine he would have said that. We would have
12 discussed that, yes.

13 Q. It's what you testified to, correct?

14 A. Yes, correct.

15 MR. BUTLER: Your Honor, could I just read into the
16 record another portion of Mr. Sheridan's transcript around this
17 time for completeness?

18 THE COURT: Very well.

19 MR. BUTLER: I'd like to read from page 152, line
20 nine. Question: Did you respond to Gerald Ma's statement,
21 "Can you confirm that this is their firm offer?" Answer: I
22 don't recall it. Maybe I said it in a phone call. I don't
23 remember. Thank you, your Honor.

24 BY MR. HOSENPUD:

25 Q. Following your phone call with Mr. Gerald Ma on Frontier

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Sheridan- Cross

1 Airlines' most recent offer which was to pay April's rent
2 current, May, June, July and beyond on time, you had a text
3 message exchange with him, didn't you?

4 A. I believe yes. I don't recall the precise chronology.

5 Q. Let's put up Joint Exhibit 42, please. We're going to go
6 to page three. So I'll represent to you that these were
7 produced in this litigation. They are your text to Gerald Ma.
8 We're on the date of April 30, 2200. You see that?

9 A. Yes, I do.

10 Q. In this text you say, For Frontier. I would suggest that
11 we go back to them with, get back current up to July before the
12 delivery, move the deliveries as they have offered, three this
13 year and two in Q1, 2021, have extensions on the 14 delivered
14 and remove the early termination options on the six from the
15 new deal that disappear if the airline has no missed payments
16 between now and May 2021.

17 Did I capture that accurately?

18 A. Yes, you did.

19 Q. And in this text exchange nowhere do you say Frontier is
20 not current in terms of owing rent, do you?

21 A. Well, I think I say it in the next paragraph, but it
22 wouldn't have necessarily been needed to be said in this text
23 exchange.

24 Q. But you don't say it here? You don't say Frontier is now
25 in default because it's past the ten-day grace period, do you?

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Sheridan- Cross

1 A. I don't say it.

2 Q. The final paragraph of this email, of this text exchange,
3 Is if they say no tonight, then we have to consider the nuclear
4 option. This is to terminate the SLB because of nonpayment of
5 lease rent, correct?

6 A. Correct.

7 Q. So at this time the notion of the nuclear option was
8 revised again, wasn't it?

9 A. Yes, because Frontier was in default on the lease
10 agreements.

11 Q. And you said nothing about that in this communication or in
12 any other communication to Gerald Ma as of April 30, 2020,
13 correct?

14 A. Well, I think I say it in this paragraph, terminate the
15 sale and leaseback because of nonpayment of lease rents in
16 April.

17 Q. You are saying here though that you're activating the
18 potential nuclear option, right?

19 A. Well, I think maybe the original terminology used in March
20 was a walkaway. In this case, it's a termination based on
21 nonpayment. So it's still a termination of the Framework
22 Agreement, but just for reasons here of nonpayment of lease
23 rent.

24 Q. And these rents are April rents and we're still in April on
25 April 30; is that correct?

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Sheridan- Cross

1 A. That's correct.

2 Q. And you do not say nonpayment of rents after April 21,
3 2020, do you?

4 A. It's just a text message exchange, no. We were speaking in
5 shorthand.

6 Q. At no place do you say in any of your communications,
7 either in email or shorthand, that the termination is for
8 nonpayment of rent after April 2021, correct?

9 A. I'm not sure I quite understand the question.

10 Q. You don't say it here in this text message. You didn't say
11 it in the prior email that we saw on the same date, did you?

12 A. Well, I'm sorry, I do -- I'm still a little confused
13 because I do say it in this text message, but I wouldn't have
14 laid out precise details within text message or an email when
15 we were having ongoing discussions with the shareholders on so
16 many occasions.

17 Q. And ongoing discussions with Frontier?

18 A. Yes.

19 Q. And knowing Frontier was having ongoing discussions with
20 Airbus?

21 A. Yes.

22 Q. Isn't it true, sir, that you received a text message from
23 Francis Lee indicating that Gerald Ma wanted you to arrange a
24 phone call between CK Assets, Mr. Ma, and Indigo Partners, the
25 shareholder of Frontier?

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Sheridan- Cross

1 A. Yes, I recall it.

2 Q. And isn't it also true that Mr. Lee wanted you to do this
3 because Mr. Ma had requested so that Mr. Ma could say to
4 somebody at Indigo Partners, this is an unwanted nuclear
5 option; is that right?

6 A. I think that was -- if you can show me the exhibit with the
7 wording.

8 Q. Happy to. Let's look at exhibit 46 at page seven. At the
9 bottom here it says, Paul, Gerald just added, If Frontier don't
10 agree anything, please arrange a call between GM and Indigo
11 Partners before our IC. GM is Gerald Ma, correct?

12 A. Correct.

13 Q. Indigo Partners is one of the shareholders of Frontier,
14 correct?

15 A. Correct.

16 Q. And IC is your, what, committee?

17 A. It would be the investment committee at CK Assets Holdings.

18 Q. Mr. Lee goes onto say, We have only one shot. We want them
19 to know that this is an unwarranted nuclear path. You see that
20 reference?

21 A. I do.

22 Q. Did you ever make that arrangement for that call?

23 A. No.

24 Q. Isn't it true that you had a conversation with Mr. Dempsey
25 on April 30 after he received your proposal in response to the

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Sheridan- Cross

1 one made by Frontier on April 30?

2 A. Yes, correct.

3 Q. And in that proposal you were accepting of the three
4 aircraft in July, prior to that it was two aircraft in July and
5 one in June; but now it was three aircraft in July, and two in
6 Q1 of 2021, correct?

7 A. Among other conditions, correct.

8 Q. And then you stated that you wanted payment to be done by
9 May 15 of the rents that had been deferred, correct?

10 A. Could I see the wording precisely so I can answer that.

11 Q. Certainly. Exhibit 123, scroll down. This is the preface.
12 I misspoke. This is the preface to your call summary with
13 Mr. Dempsey. Let me move on. We have it up now. Thank you.

14 This is exhibit for the record 120. All right. So
15 you laid out three conditions, deliveries in July, three
16 aircraft; and February, two aircraft, correct?

17 A. Correct.

18 Q. All payments to be current on May 15, 2020, and to remain
19 current, correct?

20 A. Correct.

21 Q. You don't say all payments that's are in default to be
22 current on May 15, 2020, do you?

23 A. I don't.

24 Q. And then you have the lease extensions as well?

25 A. That's correct.

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Sheridan- Cross

1 Q. You concede that this was a very unusual provision,
2 correct?

3 A. That's correct.

4 Q. Following this you had a call with Mr. Dempsey to discuss
5 this?

6 A. That's correct.

7 Q. And in that discussion he made a different proposal which
8 was to agree to the schedule for the deliveries, agree to the
9 May 15, 2020, deadline for repayment, and finally to prepay
10 rent on all five of the aircraft by six months. Is that
11 correct?

12 A. I think it is. But, again, if you can show me the email
13 that he followed up with on that.

14 Q. Yes. We'll get there. He was calling you -- he was
15 talking to you about what he could advance, and you decided to
16 take that back to the shareholder, correct?

17 A. I imagine that is correct, yes.

18 Q. And isn't it true that Mr. Dempsey on May 1, texted you and
19 said, Could I get an update for that proposal?

20 A. I don't recall that text. Again, if you could show me.

21 Q. Let's look at Joint Exhibit 127. And we're going to scroll
22 down to a more legible version of that.

23 It's dated May 1, 2020, to you, and you recognize that
24 it's being sent by Mr. Dempsey?

25 A. Yes.

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Sheridan- Cross

1 Q. He states, I had expected a call today. What's the status?
2 And you respond, We're about to get on a call with the
3 shareholders. It's at 4:30 our time.

4 And then he indicates, Okay. Airbus gave us an
5 additional 24 hours to get this done, correct?

6 A. Correct.

7 Q. You never called Mr. Dempsey back, did you?

8 A. I don't think so. I don't recall.

9 Q. And you never communicated with him in writing, did you?

10 A. I don't think so, no.

11 Q. And in this communication you understood that negotiations
12 were ongoing with Airbus, correct?

13 A. Correct.

14 Q. And further you didn't state anything about getting current
15 on April rents, did you?

16 A. I did not.

17 Q. Let's look at exhibit 42, page 13, please.

18 You were asked some questions about this text message
19 exchange with Mr. Ma regarding the termination of the Framework
20 Agreement, correct?

21 A. That's correct.

22 Q. And you stated you just want to get it done before they can
23 complicate anything; is that right?

24 A. That's right.

25 Q. And your desire was to make sure that Frontier didn't pay

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Sheridan- Cross

1 the rent before a termination could happen, correct?

2 A. I think like I said yesterday that at that point, we were
3 quite focused on getting the termination done. We especially
4 didn't want to have any complicated factors within the day of
5 the termination that might have made it difficult; for example,
6 the rent payment arriving at the same time as the termination
7 notice going out. And so once the decision had been taken, we
8 wanted to get it executed quickly.

9 Q. But you didn't want Frontier to complicate it by making
10 rent payments; is that correct?

11 A. I think that's correct, yes.

12 Q. Because if they had made the payment, you would have
13 received rents, and you couldn't do the termination, correct?

14 A. That's correct.

15 Q. Now, Mr. Dempsey sent you another communication on May 8,
16 exhibit 142; isn't that right. This is comprised of two
17 emails, one on May 8, at 7:51, and I believe this is in the
18 morning, it's Denver time, wherein Mr. Dempsey says, Been
19 waiting patiently for your response to our call whereby I
20 offered the following solution: The next aircraft delivery to
21 be moved to July 2020.

22 So that was a change to confirm what Mr. Dempsey
23 thought he could get as of April 30; is that right?

24 A. That's right.

25 Q. And a prepayment of rent six months on the near-term

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Sheridan - Redirect

1 aircraft deliveries; three aircraft delivering in July, and
2 seeking deferred rent for April and May, and having that being
3 repaid from July through December 2020, correct?

4 A. That's what he offered.

5 Q. And then he followed up with the fourth concession which is
6 at the top of this chain: Replacing AMCK as a financier on two
7 aircraft to deliver in Q4 2020, and moving those deliveries to
8 Q1 021?

9 A. As well as reiterating his rejection of our previous
10 proposal, yes.

11 Q. Yes. He told you why it was impractical?

12 A. Yes.

13 Q. And he explained that the economic cost to Frontier would
14 be astronomical, didn't he.

15 A. I'm not sure he said astronomical, but he explained that he
16 was rejecting the proposal because of that, yes.

17 Q. You never responded to this email, correct?

18 A. That's correct.

19 MR. HOSENPUD: Nothing further.

20 REDIRECT EXAMINATION

21 BY MR. BUTLER:

22 Q. Good morning, Mr. Sheridan. I just have a couple of
23 follow-up questions, and I want to ask you about this document
24 that you were just shown which is an email from Mr. Dempsey.
25 It appears to be reiterating a proposal that was made on that

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Sheridan - Redirect

1 April 30th call; is that correct?

2 A. Yes, that's correct.

3 Q. I want to ask in particular about the third item on this
4 proposal. Deferred rent for April and May 2020 is repaid from
5 July through December 2020.

6 Is that element of this proposal consistent with your
7 request that all deferred rent be repaid before the next
8 aircraft delivery?

9 A. It's not consistent.

10 Q. Did you view this latest proposal from Mr. Dempsey as a
11 step forward or step back in the negotiation?

12 A. Probably a step back. It made me realize we were not going
13 to reach an agreement.

14 Q. We're finish with that document so you can take it down.

15 Yesterday Mr. Hosenpud asked you whether you had
16 ever -- whether on the April 7th call you told Mr. Dempsey that
17 you needed authority from CK to agree to the month-to-month
18 proposal. Do you recall that?

19 A. I do.

20 Q. Whether you said anything to Mr. Dempsey about it or not,
21 did you want approval from CK for that proposal?

22 A. I did.

23 Q. Why?

24 A. A more significant concession than just the ten-day grace
25 period, I thought it's generally my style to be more

O4HBFRO1

Sheridan - Redirect

1 collaborative anyway as well. I would have wanted to have a
2 collective view on what to do next, rather than anything
3 unilateral on my part.

4 Q. Mr. Hosenpud also ask you some questions yesterday about
5 some messages talking about a MAC clause or a material adverse
6 change. And he asked you about whether the shareholder was
7 interested in walking away from financing upcoming deliveries.
8 Do you remember that testimony?

9 A. I do, yes.

10 Q. In early April 2020, did you want to walkaway from the
11 upcoming financing?

12 A. I don't think I did, but it was a very difficult time. I
13 was trying my best to make sure that we could have -- bring the
14 shareholder together with the airline and ourselves to have
15 something that would work for all parties.

16 Q. Mr. Hosenpud also asked you today about some documents that
17 refer to the nuclear option, and at least one of those text was
18 your use of the term.

19 So why did you refer to termination of the Framework
20 Agreement as the nuclear option?

21 A. I guess in short, two reasons. One is the magnitude, and I
22 think the reality of a nuclear option is one that hurts both
23 parties in some way. So, yes, mainly because of the magnitude
24 of what we were contemplating.

25 Q. In your use of the term, is a nuclear option a desirable

O4HBFRO1

Sheridan - Recross

1 option or an undesirable option?

2 A. I would say undesirable option.

3 MR. BUTLER: Thank you, Mr. Sheridan. I have nothing
4 further.

5 MR. HOSENPUD: Your Honor, may I have just a few
6 questions on redirect? Recross, pardon me?

7 THE COURT: Yes.

8 MR. HOSENPUD: Thank you.

9 RECROSS EXAMINATION

10 BY MR. HOSENPUD:

11 Q. Mr. Sheridan, at the time of the May 8 set of emails that
12 you received from Mr. Dempsey, isn't it true that Mr. Dempsey
13 had not taken payment immediately off the table from his
14 communication with you of April 30?

15 A. Excuse me. It doesn't look like he wasn't offering to pay
16 the overdue rent immediately at that point.

17 Q. He had left that open on April 30, to which there had been
18 no response; isn't that correct?

19 A. That's correct.

20 Q. He never took it off the table though, did he?

21 He knew that that was an option?

22 A. I would say it's always an option to pay overdue rent, yes.

23 Q. The second term, prepayment for six-months rent for the
24 next three deliveries. That had a value to AMCK of
25 approximately five million per aircraft total?

O4HBFRO1

Sheridan - Recross

1 A. No, approximately --

2 Q. Five million total?

3 A. No. Six months, the request would be \$300,000 per month,
4 so six months is somewhere between 1.8 and \$2 million per
5 aircraft.

6 Q. Times five aircraft?

7 A. Three aircraft in this case.

8 Q. Which would get you over five million, correct?

9 A. Yes.

10 MR. HOSENPUD: That's all I have.

11 MR. BUTLER: Nothing further, your Honor.

12 THE COURT: Thank you, Mr. Sheridan. You're excused.

13 THE WITNESS: Thank you very much.

14 (Witness excused)

15 MR. BUTLER: Your Honor, with Mr. Sheridan's
16 testimony, the defense rests.

17 THE COURT: That just leaves closing arguments, and
18 when would you prefer to do those?

19 MR. HOSENPUD: Your Honor, we have conferred, and it
20 is the preference to start those up after the second session,
21 in the second session today, 2:15.

22 THE COURT: Oh, today?

23 MR. HOSENPUD: Yes.

24 THE COURT: In other words, this afternoon?

25 MR. HOSENPUD: This afternoon.

O4HBFRO1

Sheridan - Recross

1 THE COURT: And we'll take a recess now and resume at
2 2:15.

3 MR. HOSENPUD: Thank you, your Honor. We are just
4 keeping the record open just to tidy up some last exhibits to
5 put them in the record.

6 THE COURT: Yes.

7 MR. HOSENPUD: Thank you.

8 THE COURT: You want to put in scattered things that
9 you didn't have in hand?

10 MR. HOSENPUD: Yes. We'll pick that up right at the
11 beginning.

12 THE COURT: Okay. Can't remain open forever.

13 MR. HOSENPUD: Understood. We'll put it in right at
14 the beginning of the afternoon session. Thank you.

15 (Recess)

16 (Continued on next page)

O4H3FRO2

Summation - Mr. Butler

1 AFTERNOON SESSION

2 2:30 p.m.

3 THE COURT: Good afternoon.

4 MR. HOSENPUD: Your Honor, if I could just supplement
5 the record now very briefly with the exhibits we've been
6 speaking of.

7 THE COURT: Sure.

8 MR. HOSENPUD: Yes. Joint Exhibit 27, Joint
9 Exhibit 52, Joint Exhibit 54, Joint Exhibit 135, Joint
10 Exhibit 171, Joint Exhibit 172, Joint Exhibit 173, Joint
11 Exhibit 174, Joint Exhibit 180, and Joint Exhibit 181.

12
13 MR. BUTLER: No objection, your Honor.

14 THE COURT: Received.

15 (Joint Exhibits 27, 52, 54, 135, 171, 172, 173, 174,
16 180, 181 received in evidence)

17 MR. HOSENPUD: Thank you.

18 THE COURT: Mr. Butler.

19 MR. BUTLER: Your Honor, good afternoon. I'd like to
20 start this afternoon by reviewing some of the facts that are
21 not in dispute.

22 AMCK terminated the Framework Agreement on May 8,
23 2020, by sending a formal notice setting forth the grounds for
24 termination. The grounds were that Frontier failed to pay rent
25 under 14 aircraft leases during the month of April 2020.

O4H3FRO2

Summation - Mr. Butler

1 And there is no dispute that Frontier did not make
2 these rent payments in the month of April. That's obvious from
3 the fact that Frontier actually did pay all of that rent in
4 May, after the termination by AMCK.

5 There is also no dispute that Frontier knew the due
6 date and amount of each rent payment. The monthly rent was
7 agreed at the time that each lease was entered, and we heard
8 from Mr. Sashikumar that Frontier kept careful track of that,
9 and AMCK also sent invoices well before the due date specifying
10 the amounts due.

11 Now, the non-payment of rent under the 14 leases was a
12 cross default under the lease for the 15th aircraft. That's
13 the one that delivered in March of 2020, MSN 10038. And a
14 default under the MSN 10038 lease was an event of default under
15 the Framework Agreement, that gave AMCK the right to terminate
16 the Framework Agreement without prior notice to Frontier.

17 Now, Frontier contends in this case that the
18 termination by AMCK was improper, and therefore, constituted a
19 breach of the Framework Agreement. The claim is that AMCK
20 waived the right to timely payment under the 14 leases through
21 its communications with Frontier.

22 The parties agree, I believe, that Frontier has the
23 burden of proof on that issue. That's why I'm speaking first
24 on these summations. Frontier must show by a preponderance of
25 the evidence that a waiver occurred and was continuing as of

O4H3FRO2

Summation - Mr. Butler

1 the termination date, May 8, 2020.

2 Now, waiver of a contract right depends on intent. It
3 is the voluntary abandonment or relinquishment of a known
4 right. To prove waiver, there must be a clear manifestation of
5 intent to give up a contract right.

6 Now, under New York contract law, a waiver can be
7 express or implied, meaning it could be established by words or
8 conduct. But here, the 14 lease agreements in question require
9 a waiver to be express. And the Court has already observed
10 that in the summary judgment ruling earlier in this case, but I
11 want to remind everyone of the language involved, so I'd like
12 to put up Joint Trial Exhibit 2, which is a representative
13 sample of the lease agreements, and I am going to go to
14 page 97, section 20.4, the section that deals with waivers.

15 So if we look at 20.4(a), on the third line in the
16 middle of the page, it says, "The rights of both parties
17 against the other or in relation to the aircraft" then there is
18 a paren "shall not be capable of being waived or varied
19 otherwise by an express waiver or variation in writing."

20 And then a little further down the page, three lines
21 from the bottom, or sorry, of this section, three lines from
22 the bottom of this section, "And no act or course of conduct or
23 negotiation on the part of such party or on its behalf shall in
24 any way preclude it from exercising any such right or
25 constitute a suspension or any variation of such right."

O4H3FRO2

Summation - Mr. Butler

1 So that deals with waiver, and there's also some
2 relevant language just below dealing with variations to the
3 agreement. It says -- this is in 20.4(b) "The provisions of
4 this agreement shall not be varied otherwise than by an
5 instrument in writing executed by or on behalf of lessor and
6 lessee."

7 So those contractual provisions restrict the waiver,
8 any waiver that might be possible in this case.

9 Now, the Court has already ruled that a waiver does
10 not have to be in writing, but it does have to be express. So
11 an implied waiver is not enough. And a waiver in this case, as
12 I just read, cannot be based on any act, course of conduct, or
13 negotiation. That means that conduct alone is not enough for a
14 waiver. And by the same token, silence or inaction does not
15 qualify as a waiver.

16 And of course, a waiver must always be clear. That's
17 part of the basic legal standard. A waiver requires a clear
18 manifestation of intent. So ambiguous records are not enough,
19 and words susceptible to multiple meanings are not enough for a
20 waiver.

21 Now the claim of Frontier in this case is that AMCK
22 expressly waived right to payment during a telephone call
23 between James Dempsey and Paul Sheridan on April 7, 2020. But
24 in evaluating whether an express waiver occurred on that call,
25 we believe it is important to look at the events of the

O4H3FRO2

Summation - Mr. Butler

1 preceding day, April 6, 2020, and the reason for that is that
2 both sides agree that an express waiver occurred on that day.
3 And it is important to compare what happened on April 6 to what
4 happened on April 7.

5 So, what happened on April 6? Well, there was a
6 request from Frontier for relief from two rent payments that
7 were due that day. And there then was a telephone call
8 involving Robert Fanning and Paul Sheridan, in which
9 Mr. Sheridan agreed to a forbearance or grace period of 10
10 business days ending on April 21. And let me just show you, he
11 confirmed that in an e-mail the same day, that's Joint Trial
12 Exhibit 63.

13 He confirmed all this in writing, setting forth the
14 terms of the waiver very clearly. So you don't get more
15 express than the waiver in this April 6 e-mail.

16 Now, also, on the AMCK side, Mr. Sheridan reported
17 this 10-day grace period to the shareholder CK in an e-mail to
18 Gerald Ma. That's Exhibit 64.

19 Here he's catching him up on the discussions with
20 Frontier, and he talks about the grace period of 10 working
21 days, which he talks about in the past tense. He says we
22 extended them a grace period. So he's reporting something that
23 had already been done.

24 On the Frontier side, information about the 10-day
25 grace period was disseminated within the Frontier organization.

O4H3FRO2

Summation - Mr. Butler

1 And remember Mr. Sashikumar, the gentleman who's responsible
2 for getting authorizations for rent payments. As Mr. Fanning
3 stated, Mr. Sashikumar needed to be kept in the loop with
4 respect to rent payments. Well, after the April 6 call,
5 Mr. Fanning informed Mr. Sashikumar about the 10-day grace
6 period, both by text and by e-mail. And I'll just remind the
7 Court the text is JTX 67, Mr. Fanning to Mr. Sashikumar. And
8 then the e-mail is Joint Trial Exhibit 60, where the e-mail is
9 forwarded as well to Mr. Sashikumar.

10 So in these two ways, Mr. Sashikumar was informed on
11 April 6 about this 10-day deferral period.

12 So, let's get to the April 7 call. This is the key
13 disputed factual issue in this case. But the evidence shows
14 that there were only two people on that call, Mr. Sheridan and
15 Mr. Dempsey. And there are two different accounts of what
16 happened. Mr. Dempsey says Mr. Sheridan agreed to a
17 month-to-month deferral on the call. He says that
18 month-to-month meant deferral until the next delivery from
19 Airbus, which was expected to be in late May, but might be even
20 later. Mr. Sheridan says that a month-to-month deferral was
21 discussed, but not agreed. He says that month-to-month meant
22 deferral on April rent first, with May rent to be considered
23 later if necessary.

24 Now, the words used during this call are in dispute,
25 but the written communications that took place after the call

O4H3FRO2

Summation - Mr. Butler

1 speak for themselves. So let's start with the Frontier side.
2 Communications within Frontier.

3 The same day as that call, and we'll just put up Joint
4 Trial Exhibit 73, Mr. Dempsey sent a text message to
5 Mr. Fanning about the call. And we've seen this exchange of
6 text messages before. He talks about the month-to-month
7 deferral in the message to Mr. Fanning on the upper-left-hand
8 side. And Mr. Fanning -- he talks about it, but he doesn't
9 explain what it means. Mr. Fanning responds, "Okay, good.
10 Anything mentioned about repayment and are they going to send
11 our revised agreement?" Mr. Dempsey responds, "No, but we
12 should stick to nine months from July 1, let's get a draft to
13 him." Mr. Fanning responds, "They have our draft. I'll follow
14 up with Jane." Referring to Jane O'Callaghan at AMCK. And
15 then Mr. Dempsey mentions that Paul was going to call Jane
16 after we spoke.

17 Now, as I mentioned, Mr. Dempsey does not explain what
18 month-to-month means on this call. And we've heard from
19 Mr. Fanning that he got a mistaken impression that it was a
20 three-month agreement. In fact, different people on the
21 Frontier side have a different understanding of what
22 month-to-month means. And so it wasn't even clear on the
23 Frontier side what the meaning of that term might be.

24 It's also clear from this text exchange that no
25 repayment period had been discussed or agreed on the call with

O4H3FRO2

Summation - Mr. Butler

1 Mr. Sheridan, and we've heard from Mr. Dempsey and other
2 witnesses that the interest rate that would apply to this
3 deferred rent also was not discussed at this call.

4 We've also seen evidence or heard evidence that both
5 Mr. Sheridan and Mr. Dempsey expected this to be documented in
6 writing, and in fact this text exchange shows that.
7 Mr. Dempsey says let's get a draft to him, and then Mr. Fanning
8 talks about the draft that had already been delivered to AMCK.
9 And Mr. Fanning notes that he is going to follow up with Jane
10 O'Callaghan about documenting this month-to-month arrangement.

11 One other point on the Frontier side. There has been
12 no evidence presented of any text or e-mail to Mr. Sashikumar
13 about this supposed month-to-month deferral. He says he heard
14 about it orally, it's true, but in contrast to the April 6
15 call, there was no written message delivered to Mr. Sashikumar
16 about this.

17 Now, on the AMCK side, we have a different set of
18 communications and documents about the month-to-month deferral.
19 And I'll show you Joint Trial Exhibit 76. This is
20 Mr. Sheridan's e-mail to Gerald Ma at the shareholder CK Asset
21 Holdings reporting on the situation with Frontier. And he
22 reports in the second paragraph that "In the meantime,
23 Mr. Dempsey has asked us to do the deferral on a month-to-month
24 basis, conscious that they don't want to be in default." And
25 he goes on to say, "Since the next delivery isn't going to be

O4H3FRO2

Summation - Mr. Butler

1 in April now that the Mobile plant is shut, I think we can
2 agree to this and give them a bit more time to work with
3 Airbus."

4 This, your Honor, is the best evidence of what
5 Mr. Sheridan understood month-to-month to mean on that call.
6 What he understood month-to-month, the month-to-month request
7 to mean. It also indicates that there had not yet been an
8 agreement reached. He doesn't report the agreement as
9 something that has already happened. He reports it is
10 something we can agree to. And as Mr. Sheridan has testified,
11 he was sending this e-mail in order to get approval from CK for
12 this additional deferral.

13 And I think we've also seen evidence and heard from
14 Mr. Sheridan that it was generally important to get CK's
15 approval. They were a very active shareholder, they were very
16 active in AMCK's business, and it is also important that the 14
17 aircraft for which Frontier was seeking deferral were aircraft
18 that were owned by CK. So it would have been particularly
19 important to get CK's buy in to any rent deferral with respect
20 to those aircraft.

21 Now, after Mr. Sheridan sent this e-mail, there was an
22 exchange of e-mails within the CK organization, so let's show
23 that. Joint Trial Exhibit 77. And let's see the e-mail from
24 Paul I think is on the second page, if I remember correctly.

25 And we scooch it over so we can see we see Paul's

O4H3FRO2

Summation - Mr. Butler

1 e-mail we just looked at, Gerald Ma asks for input from Francis
2 and Lillian and ask if there is going to be 6 percent interest.
3 Then going back to the first page at the bottom. We can see
4 Mr. Ma says, "Personally, I think as long as we don't have to
5 take delivery this month, giving them one-month deferral seems
6 okay."

7 So this is evidence that, at least on the CK AMCK
8 side, they thought what was being discussed was a one-month
9 rent deferral. Francis Lee chips in to say he thinks it's
10 okay. And the e-mail towards the top of the page, Lillian
11 Kiang also says that she agrees if no delivery in April, we can
12 agree to a one-month deferral.

13 After this exchange of e-mails with the shareholder at
14 CK, Mr. Sheridan testified that he asked Jane O'Callaghan to
15 put together an agreement. And in fact Jane O'Callaghan did
16 send a draft agreement, Joint Trial Exhibit 79, over to
17 Frontier. And she says in her cover e-mail that this is a
18 draft deferral letter for one of the 14 aircraft, but we are in
19 the process of cloning the letter out for the other 14. Or for
20 the other 13, rather, aircraft.

21 And let's take a look at the letter itself. The
22 forbearance letter itself. On the first page towards the
23 bottom, you can see that the forbearance here is only for the
24 rent payment due in the month of April. And then if we go to
25 the top of the next page, Rishika, we can see the other terms.

O4H3FRO2

Summation - Mr. Butler

1 AMCK was proposing an interest rate of 6 percent per annum, and
2 they're proposing a repayment period of three months ending in
3 July of 2020.

4 Now, I think I said earlier that another document was
5 the best evidence of AMCK's understanding of the month-to-month
6 deferral, but I misspoke. Really, this is the best evidence of
7 it. This is the draft agreement that AMCK put together, and it
8 is perfectly consistent with Mr. Sheridan's understanding of
9 the month-to-month discussion, that it was only going to be for
10 the month of April at first, and that there are other terms
11 that were not discussed, but from AMCK's perspective, they
12 wanted a three-month repayment period, and 6 percent interest.

13 One other document on the AMCK side is Joint Trial
14 Exhibit 17. That's a series of text messages from Jane
15 O'Callaghan with Robert Fanning. And on page 4 of that
16 exhibit, we can see a text message from April 21, 2020, recall
17 that is the last day of the 10-day grace period offered by
18 AMCK. And Ms. O'Callaghan says to Mr. Fanning, "We haven't had
19 your feedback on draft rent deferral agreement for April.
20 Thank, Jane."

21 So on the last day of the 10 working day grace period,
22 Ms. O'Callaghan clearly reached out to Mr. Fanning about the
23 rent deferral agreement for April because she hadn't heard
24 anything back from the Frontier side. Once again, even after
25 sending this reminder text, there was no word from the Frontier

O4H3FRO2

Summation - Mr. Butler

1 side about that draft agreement. Clearly, they never accepted
2 the agreement or entered that one-month deferral with AMCK.

3 So those are the two versions of that April 7 call,
4 and I've walked through really all of the evidence that is
5 relevant to or almost all of the evidence that is relevant to
6 what happened on that call.

7 And I want to point out that there are reasons to
8 question Mr. Dempsey's version of events that day. The first
9 thing I would note is in Exhibit 73, and well, why don't you
10 put up Exhibit 73, the first text from Mr. Sheridan. His
11 statement was that there was an agreement on rent deferral on
12 that call. "Agreement" is the term that he used. And that's
13 not credible, your Honor, because the material terms of rent
14 deferral were not discussed on that call. As this exchange
15 with Mr. Fanning makes clear, the repayment terms were not
16 discussed at all. And as I said, we've heard from other
17 witnesses that the interest rate was not discussed either.

18 Now, and we know that there was no meeting of the
19 minds on one of these material terms, because, as indicated in
20 this text exchange, Mr. Dempsey wanted a nine-month repayment
21 period. And as we know from the draft agreement sent over from
22 AMCK, AMCK wanted only a three-month repayment period.

23 One other point is that any agreement on rent deferral
24 would have needed to be in writing. And indeed, there is
25 evidence that both Mr. Dempsey and Mr. Fanning expected this

O4H3FRO2

Summation - Mr. Butler

1 agreement to be reduced to writing and it never was.

2 So, whatever happened on that April 7 call, there
3 certainly was no agreement on rent deferral. And that
4 contradicts Mr. Dempsey's testimony and the statement in this
5 text message.

6 Second reason for doubting Mr. Dempsey's version is
7 that his understanding of what month-to-month means is not
8 plausible. He says month-to-month meant deferral until the
9 next aircraft delivery. But he didn't use those terms at the
10 time. He didn't describe it as a deferral until the next
11 aircraft delivery. He used the term month-to-month. And
12 month-to-month is not shorthand for until the next aircraft
13 delivery. Month-to-month means first one month, and then
14 potentially the next month, and so on.

15 So his use of the word month-to-month itself is not
16 consistent with his current position that what was discussed
17 was a deferral until the next aircraft delivery.

18 There is another reason to question his version of
19 events, and that is that he changed his story on the meaning of
20 month-to-month between his deposition and his testimony here in
21 court. So let me show Mr. Dempsey's deposition, I'll start
22 with page 77, line 15. Mr. Dempsey was asked:

23 "Q. So was it your understanding that this was an indefinite
24 deferral of rent under your agreements with AMCK?

25 "A. No, it was a fluid situation, but clearly, at this point,

O4H3FRO2

Summation - Mr. Butler

1 it was for the month of April."

2 I'll show you page 79, two pages later. Line 10 I
3 asked the question:

4 "Q. When you use the term month-to-month, does that mean that
5 basically you're agreeing one month at a time? So first, let's
6 agree to the end of April, then later we'll agree to the end of
7 May if it's necessary?

8 "A. Correct."

9 Those descriptions of a month-to-month deferral are
10 precisely consistent with Mr. Sheridan's understanding of
11 month-to-month. But, deferral for the month of April would not
12 be enough for Frontier to win this case. The termination took
13 place on May 8th. So any waiver that was limited to the month
14 of April would have expired by that time.

15 So now we have different testimony from Mr. Dempsey.
16 He says month-to-month doesn't mean at first to the end of
17 April. He says until the next delivery and he has another
18 variation of until all negotiations are complete. Your Honor,
19 the fact that Mr. Dempsey has changed his story is another
20 reason to doubt it.

21 Just another point I'd like to make is Mr. Dempsey's
22 account of the April 7 call is also quite incongruous or
23 inconsistent with what happened the day before, on April 6. So
24 on April 6, Mr. Sheridan agreed to a waiver, and -- well, I'm
25 sorry. He agreed to a waiver or a forbearance that was narrow,

O4H3FRO2

Summation - Mr. Butler

1 and carefully defined. It's 10 working days, until April 21.
2 And he documented that forbearance in a written e-mail shortly
3 after the call.

4 Now, according to Mr. Dempsey, on the very next day,
5 Mr. Sheridan agreed to an open ended deferral with no clear end
6 date. And according to Mr. Dempsey, Mr. Sheridan did not
7 memorialize the agreement in any way. He just agreed to it on
8 a phone call. So to believe Mr. Dempsey, we really would have
9 to conclude that Mr. Sheridan underwent a kind of personality
10 transplant between April 6 and April 7. According to
11 Mr. Dempsey, his behavior on these two days was completely
12 different.

13 Now, it makes no sense that Mr. Sheridan would have
14 acted so differently on two consecutive days of April 2020.
15 Since it makes no sense, it probably did not happen that way.

16 One other reason to question Mr. Dempsey's account is
17 that there are no internal communications apart from that one
18 text message that we looked at, confirming the month-to-month
19 arrangement from within the Frontier organization. And
20 remember, Mr. Sashikumar, the gentleman who needed to be kept
21 in the loop, there's no text message or e-mail to him about a
22 deferral past that 10-day deferral to April 21. And there are
23 no other internal memorializations on the Frontier side of the
24 month-to-month agreement, no other documents from the Frontier
25 side that clarify what month-to-month means.

O4H3FRO2

Summation - Mr. Butler

1 Now, to be sure, Frontier witnesses have all testified
2 that they believed a deferral was in place while negotiations
3 with AMCK are underway, but they all got that information from
4 Mr. Dempsey. Mr. Dempsey was the only one on the April 7 call
5 with Mr. Sheridan. So if Mr. Dempsey's story is not
6 believable, then none of the other Frontier witnesses are
7 credible on this point either.

8 The last point I'll make, your Honor, the last reason
9 to question Mr. Dempsey's credibility with respect to the
10 April 7 call, is the correspondence that took place immediately
11 after the termination. Mr. Dempsey said he was shocked when he
12 got the termination notice from AMCK, because there was this
13 month-to-month waiver in place. But in the two letters written
14 by Frontier immediately after the termination, there is no
15 mention of the April 7 call, and no mention of a month-to-month
16 agreement. Mr. Dempsey testified that he was involved in the
17 preparation of both these letters. He at least reviewed them
18 before they were sent.

19 And I want to show you first Joint Trial Exhibit 150.
20 This is a letter from Mr. Ernie Yu of AMCK. This is actually
21 after the first letter. But I just want to emphasize that in
22 AMCK's response, it was emphasized that no waiver took place,
23 and in fact in that third paragraph of this letter, at the
24 bottom, Mr. Yu says, this -- he's referring to the April 6
25 agreement, the 10-day waiver, and he writes "This is the only

O4H3FRO2

Summation - Mr. Butler

1 commitment made by AMCK with respect to non-payment of rent by
2 Frontier, and that commitment obviously expired after April 21,
3 2020."

4 So now let's go to Joint Exhibit 151. This is the
5 response from Frontier, and obviously this letter was sent in
6 order to rebut the contention of AMCK that no waiver had
7 occurred, and that the only waiver was the April 6 agreement.

8 And in fact, that's what the letter says. And
9 Mr. Diamond, the author of this letter, says in the fourth
10 paragraph, "I would like to remind AMCK of the following facts
11 that support our claim that AMCK both expressly and impliedly
12 deferred Frontier's payment obligation with regard to the
13 leased aircraft." And what follows is a chronology of numbered
14 paragraphs describing the events that support Frontier's claim
15 that a waiver occurred.

16 And I'll direct the Court's attention to numbered
17 paragraph 3 where the April 6 e-mail is discussed, and the
18 position taken here is that, in the second sentence, it says,
19 "And thus any deferral given should reasonably be interpreted
20 to survive while Frontier and Airbus were finalizing the
21 aircraft delivery deferrals requested by AMCK."

22 So the position taken here is that the April 6 10-day
23 waiver should be reasonably interpreted to survive. And then
24 the next paragraph goes on to the April 30, 2020, letter from
25 Mr. Sheridan, and then subsequent paragraphs talk about other

O4H3FRO2

Summation - Mr. Butler

1 events. But, the letter jumps from April 6 to April 30,
2 without any mention of an April 7 telephone call, and without
3 any mention of a month-to-month deferral.

4 Now, on the other side of the coin, we believe there
5 are a number of reasons to believe Mr. Sheridan's testimony
6 that there was no agreement on April 7, and that month-to-month
7 deferral meant at least in first, at first, deferral for the
8 month of April.

9 For example, there is evidence that rent deferral
10 agreements are almost always documented in writing in this
11 industry. And there is evidence that both sides expected any
12 rent deferral between Frontier and AMCK to be documented in
13 writing. There's also evidence that Mr. Sheridan was being
14 particularly cautious around this time about having his words
15 construed as a binding commitment. And you may recall that
16 language that Mr. Sheridan appended to the bottom of some of
17 his proposals to Frontier. He did not want his words to be
18 casually interpreted as binding commitments.

19 Mr. Sheridan in fact had already resisted any kind of
20 open ended deferral when he constructed the 10-day grace period
21 for April 6. He was very careful to say that it only lasted
22 until April 21. He was very careful to define his terms.

23 There's also considerable evidence that Mr. Sheridan
24 wanted to run important decisions past the shareholder, CK
25 Asset Holdings. As I said, that was especially true for this

O4H3FRO2

Summation - Mr. Butler

1 rent deferral decision, because the rent proposed to be
2 deferred was for aircraft owned by CK. So the financial impact
3 of this rent deferral would affect CK as an individual
4 shareholder.

5 We've also seen evidence that Mr. Sheridan was under
6 pressure from his shareholder to not give anything away in this
7 negotiation and to extract the best possible deal from
8 Frontier. We've seen some of those e-mails from Gerald Ma.
9 Some of them have exclamation marks and all caps, where
10 Mr. Sheridan was asked to -- was told we only have one shot at
11 this negotiation.

12 So for that reason, there is reason to think it's
13 unlikely that Mr. Sheridan would have agreed to any open ended
14 deferral on the spot, without checking first with CK Asset
15 Holdings.

16 I'd also add that Mr. Sheridan's testimony is fully
17 corroborated by the written communications immediately after
18 April 7. He reports it to CK as something that can be agreed
19 to, not something that was agreed to. And the draft agreement
20 prepared by Ms. O'Callaghan is perfectly consistent with
21 Mr. Sheridan's understanding of what month-to-month means. And
22 the fact that a draft agreement was sent at all confirms
23 Mr. Sheridan's expectation that whatever was discussed on
24 April 7 would be committed to a written agreement.

25 I'd just add that Mr. Sheridan's understanding of

O4H3FRO2

Summation - Mr. Butler

1 month-to-month deferral is also the most natural and plausible
2 understanding of that term. Month-to-month implies that you
3 start with one month, and then you may or may not agree on the
4 next month, you may or may not agree on the month after that,
5 and so on. That's just the natural meaning of that term, and
6 it's consistent with Mr. Sheridan's version of events.

7 Finally, Mr. Sheridan has been consistent and has not
8 changed his story in any material way between his deposition
9 back in 2022 and his testimony yesterday and today. His story
10 is also perfectly consistent with the correspondence from AMCK
11 immediately after the termination in 2020.

12 Now, your Honor, the April 7 waiver is Frontier's main
13 argument, and we submit it's really the only factual issue that
14 needs to be determined in this case. But there are some other
15 I'll call them themes explored by Frontier in their questioning
16 of witnesses.

17 Our position is that these themes are all irrelevant
18 to the issue of waiver, particularly the issue of waiver on
19 April 7, but I want to touch on a few of them.

20 First, there is a theme in the questioning that
21 Frontier negotiated with Airbus at AMCK's request. And
22 Frontier witnesses have testified that Frontier did not want to
23 do this negotiation with Airbus, and that it was a tough
24 negotiation to try to move the dates of these aircraft.

25 There seems to be a suggestion that somehow, that this

O4H3FRO2

Summation - Mr. Butler

1 somehow binds AMCK to a rent deferral, until the next aircraft
2 delivery. Now as a legal matter, Frontier's conduct vis-a-vis
3 Airbus should not bind AMCK in any way. Frontier's conduct
4 cannot create a waiver by AMCK or a rent deferral agreement.

5 And I'd also ask the Court to remember that Frontier
6 testified that it started these discussions with Airbus before
7 the April 7 call, so they're not directly related to whatever
8 was discussed on that call.

9 Another point I'd make is Frontier had its own reasons
10 for negotiating delays from Airbus. We saw evidence that
11 Frontier in the end negotiated dozens of aircraft deferrals,
12 and Mr. Dempsey testified yesterday that Frontier had its own
13 business reasons for some of those aircraft deferrals.

14 One more thing on this topic. AMCK did suggest
15 pursuing delivery delays from Airbus, but they did so in
16 response to Frontier's request for rent deferral. So Frontier
17 clearly had its own incentive to pursue these talks with
18 Airbus. Frontier wanted the rent deferral from AMCK, and these
19 talks were one way to achieve that goal.

20 Another theme that has developed in the questioning by
21 the -- on the Frontier side is there may be arguments about
22 AMCK's silence, and the fact that AMCK did not respond to
23 certain requests or queries from the Frontier side.

24 There are a number of variations on this theme. It's
25 been emphasized that AMCK never asked Frontier to pay the rent

O4H3FRO2

Summation - Mr. Butler

1 that was due. It's been pointed out that they stopped sending
2 chase e-mails during a period of time. Another variation is
3 that when Frontier offered to get current, AMCK did not say
4 anything. There has also been testimony that Frontier asked
5 AMCK if they would finance deliveries if Frontier got to up to
6 date on its rent payments, and AMCK did not respond. And this
7 morning we heard testimony from Mr. Sheridan and a number of
8 questions from Mr. Hosenbud establishing that AMCK never told
9 Frontier that its rent was overdue, and it certainly never told
10 Frontier in advance that there was going to be a termination of
11 the Framework Agreement.

12 These arguments about AMCK's non-responses, about
13 AMCK's silence, are red herrings for two reasons. First, the
14 lease agreements require an express waiver as I indicated. An
15 implied waiver is not enough. So AMCK's silence with respect
16 to payment of rent cannot be construed as a waiver of payment
17 of rent.

18 And second, I'd just add that Frontier knew when all
19 these payments were due. The amount and due dates were
20 established when the lease agreements were entered, and as I
21 pointed out, Mr. Sashikumar maintained a database to tell
22 Frontier when all these payments were due. So Frontier didn't
23 need reminder e-mails or questions from AMCK to know when its
24 lease payments were due. There was just no secret about that.

25 Another theme that has been advanced through

O4H3FRO2

Summation - Mr. Butler

1 questioning is that AMCK delivered a consistent message that
2 Frontier needed to be current by the next delivery date. Now
3 it's true there is evidence that Mr. Sheridan and
4 Ms. O'Callaghan delivered that message, and there were
5 variations on the message, but the gist of it was that Frontier
6 needed to pay all the past due rent before any further
7 deliveries from Airbus. Those statements, however, arose in
8 the context of negotiation over the rent deferral requested by
9 Frontier. Those statements describe a limit on what AMCK could
10 agree to in the negotiation, so they were not made in a vacuum.
11 And Frontier, it appears, wants the Court to read those
12 statements as standalone concessions that Frontier did not have
13 to pay the rent. But they should not be read in isolation,
14 your Honor, and they should not be read out of context of the
15 ongoing negotiation.

16 Remember, the agreement says that negotiation cannot
17 constitute a waiver. So statements made plainly in the context
18 of a negotiation cannot just be snatched out of context and
19 made into binding waivers.

20 The last point I'll discuss, your Honor, has to do
21 with the argument that AMCK never wanted to take delivery or
22 that AMCK always wanted to terminate. We've seen evidence that
23 at least some individuals on the AMCK side, particularly at the
24 shareholder, had some questions about whether delivery was
25 appropriate. There was evidence about Gerald Ma asking about a

O4H3FRO2

Summation - Mr. Butler

1 MAC clause, clearly exploring the possibility of terminating
2 the Framework Agreement early on.

3 THE COURT: Mr. Butler, before you develop that point,
4 let me ask you a question about the points you've made so far.

5 Let's assume that because of the incoherence and
6 internal conflicts about dates and extensions of time, there
7 was never a coherent waiver reached to pay the rent on the 14
8 planes. And therefore, the right to payment continued
9 unimpaired. Let's assume all of that in your favor. And it
10 may be easy to reach and it may be impossible to reach, but
11 let's assume that.

12 Would not you still face liability under the law for
13 the failure to give the notice and opportunity to cure?

14 MR. BUTLER: Your Honor, no. Simply because the lease
15 agreement provides no notice -- there is no provision of the
16 lease agreements that allows or that requires notice and
17 opportunity to cure when a default occurs. It's the nature of
18 these agreements that they're extremely strict --

19 THE COURT: Isn't there such an obligation in the law?

20 MR. BUTLER: I don't believe so, your Honor. I don't
21 believe so. There is an obligation that arises when there has
22 been a waiver, if it is going to be withdrawn, there must be a
23 reasonable opportunity to cure, after the waiver is withdrawn.
24 But that presumes the existence of a waiver in the first place.
25 I thought we had addressed this in our trial brief, but that's

O4H3FRO2

Summation - Mr. Butler

1 our position certainly, that where there is no waiver at all,
2 unless there is some provision of the agreement that requires
3 prior notice, the party is free to terminate the contract,
4 based on the default.

5 THE COURT: Of course, the contract says that for
6 non-payment in the manner of stipulated within five business
7 days of written notice must be given.

8 MR. BUTLER: If you could tell me the provision, I can
9 take a look at the contract.

10 THE COURT: My larger point is, isn't that simply a
11 statement of the general law?

12 MR. BUTLER: I don't believe it is, your Honor. I
13 don't believe it is. I think where there is a payment default
14 in particular in these lease agreements, the lease agreements
15 are very strict, and I don't believe there is any common law or
16 contract law general provision that requires, once a default
17 occurs, that requires some kind of notice that you are going to
18 act on the default.

19 It may seem kind of harsh, but that's the business
20 reality in this industry, that the rent payment provisions are
21 very strict, so there's no requirement -- yeah. Absent
22 something in the agreement, I don't believe there is any
23 requirement under New York law that you provide prior notice of
24 a termination where a default condition exists and is
25 continuing.

O4H3FRO2

Summation - Mr. Butler

1 THE COURT: I interrupted you. You were on your way
2 to your final point.

3 MR. BUTLER: Very close to it, your Honor. I was
4 talking about the theme that AMCK never wanted to take delivery
5 of these aircraft. And I want to point out that the record
6 does not indicate that this was some kind of plot on the part
7 of AMCK to terminate from the beginning.

8 In fact, there's evidence that AMCK viewed termination
9 of the Framework Agreement as a terrible option. They called
10 it a nuclear option, something you don't want to do unless you
11 have to do it.

12 And in the end, this option was taken only after
13 careful consideration and after a meeting of the AMCK board
14 authorizing the termination. Before that time, there was no
15 official decision on the AMCK part -- on the AMCK side, to
16 terminate the agreement.

17 And before that decision, the evidence indicates that
18 AMCK was negotiating in good faith to try to avoid this
19 outcome, to try to reach an agreement with Frontier.

20 So, your Honor, I'll end by just saying, in sum, that
21 the only waiver in this case is the 10 working day forbearance
22 that was agreed on April 6, and that expired on April 21. And
23 because Frontier was in payment default, beginning after
24 April 21, AMCK had every right to terminate when continue did,
25 on May 8th.

O4H3FRO2

Summation - Mr. Butler

1 I want to thank you, your Honor, for the time and
2 attention that you've given to this case, and for your careful
3 consideration of our arguments. Thank you.

4 THE COURT: Thank you, Mr. Butler.

5 MR. SCHAER: Just one moment, your Honor, while we get
6 situated here.

7 MR. BUTLER: Your Honor, while the other side is
8 getting situated, I have an answer to your question now that
9 the provision is in front of me. Your question was about the
10 five business day period in Section 16.1(a) I believe. And --

11 THE COURT: That's the one in the Framework Agreement,
12 yes.

13 MR. BUTLER: This one is one in the lease agreements,
14 so the lease agreements that required the rent to be paid. And
15 the five business day period that you referred to, your Honor,
16 towards the end of Section 16.1(a), applies to any other sum
17 due under this agreement, but it does not apply to any basic
18 rent or security.

19 THE COURT: What's your point?

20 MR. BUTLER: My point, your Honor, is that the five
21 business days that you asked about, that doesn't apply to basic
22 rent which is a defined term.

23 THE COURT: I was simply asking if it didn't apply. I
24 wasn't -- I wasn't asking what it said.

25 MR. BUTLER: Pardon me, your Honor. I misunderstood.

O4H3FRO2

Summation - Mr. Schaer

1 Forgive me.

2 MR. SCHAER: Good afternoon, your Honor.

3 Time. This case is about time. The time Frontier
4 wanted for rent deferrals, the time AMCK wanted for delivery
5 deferrals, and the time it would take each of them to reach
6 formal agreements on both of those key items.

7 So what did the parties do? They gave themselves
8 time. Specifically, AMCK granted Frontier an informal
9 deferral, or a waiver, as us lawyers or the law calls it, to
10 provide the time necessary to first negotiate and reach an
11 agreement with Airbus, delaying deliveries of the remaining
12 five aircraft due under the Framework Agreement, and second,
13 only after reaching that agreement with Airbus, negotiate and
14 finalize an agreement with each other on the terms of a formal
15 written rent deferral.

16 But while the waiver was ongoing, while negotiations
17 were ongoing, and without ever saying it was withdrawing the
18 waiver or expecting a payment, AMCK terminated the Framework
19 Agreement, abandoning its remaining obligations to pay for, and
20 take delivery of, the five aircraft that we know it didn't
21 want. As a matter of law, it cannot do that. And that is why
22 we are here today.

23 Now, as the Court astutely observed, this case is
24 facially complicated but the principles are quite simple. Was
25 there a waiver? If so, what is the scope of that waiver? Was

O4H3FRO2

Summation - Mr. Schaer

1 the waiver properly withdrawn and was Frontier provided a
2 reasonable time to repay? And finally, damages.

3 I want to walk through each of those now, but before I
4 do, I will just ground us in the familiar breach of contract
5 elements. Those four elements, of course, there is a valid
6 contract, a breach of that contract, performance by the party
7 trying to hold the other in breach, and damages.

8 Now, there is no dispute that there is a valid
9 contract in the case, that is the Framework Agreement, the
10 Court saw that at length and the Court also saw all of the
11 interrelated contemporaneous contracts involving all of the
12 other parties relating to lease agreements.

13 Nor is there any real dispute, factual dispute on the
14 second element, that AMCK terminated its obligations under the
15 valid Framework Agreement.

16 So the real dispute in this case is on the third
17 element, whether Frontier performed its contractual duties
18 consistent with the waiver, such that it can hold AMCK in
19 breach for that termination of the valid contract.

20 Of course, there is a disagreement about the extent of
21 damages, which I will address at the end.

22 So, what is a waiver? It is a clear manifestation of
23 a party's intent to relinquish a contractual right. That's it.
24 It can occur through express statements, which we have many of
25 in this case. It can also occur through affirmative conduct or

O4H3FRO2

Summation - Mr. Schaer

1 by failure to act so as to evince an intent not to claim a
2 purported advantage.

3 Even when there is a complete non-waiver clause in a
4 contract, which we do not have in this case, but even where
5 there is a complete non-waiver clause in a contract, New York
6 courts still find that a waiver exists when a party has clearly
7 manifested an intent to provide one, be that through express
8 statements or through conduct.

9 Now, as discussed previously, waiver is a part of
10 contract law. When there is a dispute as to material terms,
11 which we have here, courts are instructed to look to that
12 extrinsic circumstantial evidence to discover whether the
13 waiver existed, and its scope.

14 Also like contract law, any alleged subjective,
15 secret, unstated intent by one of the parties is irrelevant to
16 the pertinent question of what did the defendant clearly
17 manifest to the plaintiff.

18 Now, counsel explained a couple other principles
19 related to waiver. One of them is that silence is not enough.
20 First, the full quote is mere silence is not enough. When
21 there are other things combined with silence, silence is an
22 important factor here. But no one, at least we are not saying
23 that all they provided was silence. There is a lot in the
24 record on top of their repeated silence, in response to our
25 questions about their commitments.

O4H3FRO2

Summation - Mr. Schaer

1 There is also a comment that uncertain terms in a
2 waiver are not enough to create a waiver. No one is saying
3 that. We are just saying when there is some dispute over
4 material terms, which is here, the Court employs the usual
5 contract interpretation principles to discover what those
6 disputed terms meant.

7 So that bring us to the question, what did AMCK
8 clearly manifest to Frontier? Everything it communicated to
9 Frontier underscored that there was a waiver in place.

10 Now, what was the scope of that waiver? First it was
11 10 days, and then it was extended on a month-to-month basis.
12 With the understanding, reinforced many times over, in many
13 mediums, that so long as there was no delivery of an aircraft,
14 the waiver could continue.

15 Now what was the purpose of the waiver? AMCK has
16 actually put that in writing for us. It was to provide the
17 parties the time to negotiate and reach an agreement with
18 Airbus on delivery deferrals, and second to negotiate and reach
19 an agreement with AMCK on rent deferrals.

20 Darcy, will you unmute the video for a second.

21 I just want to show the Court a demonstrative that we
22 looked at earlier in the case to clarify this point. This is
23 the construct. This is the waiver. It was a month-to-month
24 rent deferral, a month-to-month waiver to provide the parties
25 with the time to do the things on the bottom. First it was

O4H3FRO2

Summation - Mr. Schaer

1 Airbus delivery deferrals, and to negotiate the terms of a rent
2 deferral repayment. Later, near the end, AMCK starts asking
3 for additional lease concessions, we saw those, the lease
4 extensions for all 18 aircraft, or for 18 of the aircraft that
5 would have amounted to about \$200 million.

6 Now, of course, the area in red or to use the nuclear
7 option and terminate the Framework Agreement, that is not
8 something that Frontier knew. But, everything else, this is
9 the construct, we need a waiver to provide us time to do these
10 things on the bottom. So long as there was no delivery, the
11 parties still had the time and the waiver continued.

12 Now the Court has seen a lot of evidence that
13 corroborates this. We've seen testimony from AMCK's own
14 witnesses that corroborates this, including Ms. O'Callaghan
15 saying the waiver was in place to allow Frontier time to reach
16 agreement with Airbus. We've seen contemporaneous documents
17 from the parties, including the one from Mr. Sheridan on
18 April 6 that establishes the first waiver laying out the
19 understanding and the construct. And I quote his words,
20 "Mindful of the time it might take to you reach agreement with
21 Airbus or to make some other arrangements and therefore of the
22 ability for us to reach a deferral agreement, you have 10
23 business days. You have until April 21."

24 We have Mr. Dempsey's testimony about the April 7 call
25 explaining the extension of the waiver to the month-to-month

O4H3FRO2

Summation - Mr. Schaer

1 understanding, using that same construct reached and expressed
2 on April 6. He also explained why it was extended. Because
3 there was no chance that there was going to have an airplane
4 delivery in the next 10 business days. Airbus was closed until
5 April 29. Nothing was going to happen on April 21. And with
6 the concern being there cannot be a delivery before payment,
7 the parties could push that out.

8 We've also heard from Mr. Sheridan that he has no
9 memory of what was said on that call, so we have one account.

10 But we did hear from Mr. Sheridan this morning that he
11 wanted the month-to-month waiver. And we know that he then
12 reached out to his shareholder who then approved that, what he
13 says had him seeking approval. We'll come back to that
14 momentarily.

15 Now, I want to be clear that none of Mr. Dempsey's
16 deposition testimony is out of step with that understanding.
17 We saw some snippets, we tried to put in the larger portions
18 during the actual testimony, but what is clear is that on
19 April 7, when the parties reached the month-to-month
20 understanding, Frontier had not yet gotten the next airplane
21 out of May. That next plane was delivering into May. So when
22 asked the question to Mr. Dempsey, hey, first you'll agree to
23 the end of April, and then you'll later have to agree to the
24 end of May, and he says that's correct, that's because he
25 didn't have until the end of May. He needed to go back to

O4H3FRO2

Summation - Mr. Schaer

1 Mr. Sheridan and say I have moved the delivery and, therefore,
2 the repayment moves along with it. That is the waiver. So
3 long as there is no delivery, there is no payment. The
4 delivery was still in May when they first agreed, it moved into
5 June, and then later it moved into July. And so, too, with it,
6 the waiver period.

7 We also have the contemporaneous text message by
8 Mr. Dempsey to his team at Frontier stating unequivocally:
9 Just spoke to Paul Sheridan, he has agreed to do the deferral
10 on a month-to-month basis.

11 We have repeated references from AMCK that their
12 consistent concern all the way back on April 1st in a text
13 message between Ms. O'Callaghan and Mr. Fanning is that rent
14 deferrals on the 14 aircraft must be linked to delivery
15 deferrals of the remaining five neos in 2020. That's Joint
16 Exhibit 17.

17 That was reiterated ad nauseam as the Court saw
18 throughout the parties' conversation. Repayment is linked to
19 deliveries.

20 You also have Mr. Fanning telling Ms. O'Callaghan on
21 April 29 that one solution to the parties' negotiations is that
22 "the current rent deferral would stay in place."
23 Ms. O'Callaghan says nothing to alter that understanding, that
24 there is still a rent deferral in place on April 29.

25 We have Mr. Dempsey telling Mr. Sheridan both on

O4H3FRO2

Summation - Mr. Schaer

1 April 27 and April 30 that we, Frontier, understood and were
2 operating under the assumption that you just wanted no
3 outstanding payments at the time of the next delivery. On
4 April 27 and April 30, Mr. Sheridan says nothing to disabuse
5 Frontier of its understanding and assumption of the waiver.

6 We have Mr. Sheridan's internal communication to his
7 shareholders on April 30, saying in his own words, "Frontier
8 will immediately pay outstanding April rents on which we agreed
9 an informal deferral pending agreement with Airbus on delivery
10 delays." That's the waiver in his own words to his
11 shareholders on April 30.

12 He testified this morning that when he said April,
13 what he really meant was April 21 and 10 business days. That
14 is not what he wrote to his shareholder on April 30 when he
15 says "on which we agreed an informal deferral pending agreement
16 with Airbus on delivery delays." Says nothing about the waiver
17 being over on the 21st. Says nothing about it expired at that
18 time. He echos exactly what the parties have reached. That as
19 long as there is no delivery, the waiver continues, to allow
20 the parties time to complete negotiations with Airbus, and then
21 each other.

22 In the record, the only date that AMCK ever gives to
23 Frontier, besides the next delivery, is on May 15, or that date
24 is provided on April 30, and AMCK requests repayment by May 15.
25 The parties never got to May 15.

O4H3FRO2

Summation - Mr. Schaer

1 And we've seen that the negotiations were ongoing
2 between the parties into May. After having an April 30 phone
3 call, Mr. Dempsey is waiting for Mr. Sheridan's response, and
4 he sends him a text message on May 1st saying what's the
5 status, I'm waiting for your response. Does Mr. Sheridan say,
6 the waiver's over? We're now past April 21, we're now past
7 April 30. No, he says I need to talk to my shareholder, I'll
8 get back to you. We saw Mr. Dempsey then had to follow up with
9 him again on May 8 because Mr. Sheridan still did not respond,
10 knowing Mr. Dempsey was looking for a response. Did he respond
11 to that May 8 query? Of course not. The next thing from AMCK
12 is the termination notice.

13 Now, we also have testimony from all of Frontier's
14 witnesses that corroborate the understanding of the
15 month-to-month deferral. They understood the scope of the
16 waiver. They all said that no one ever told them anything that
17 called into question their understanding, and that they were
18 all incredibly conscious of not going into default with AMCK.
19 Mr. Dempsey said this in the text messages to Mr. Sheridan, or,
20 sorry, the e-mails to Mr. Sheridan on April 6, that's Joint
21 Exhibit 63. Mr. Dempsey reiterates this to Mr. Sheridan on
22 their April 7 phone call where they agreed to the
23 month-to-month deferral. And we know that because Mr. Sheridan
24 communicates that to his shareholders that Frontier is
25 incredibly conscious of going into default with us. That's

O4H3FRO2

Summation - Mr. Schaer

1 Joint Exhibit 77.

2 And indeed, Frontier paid all of the rent due through
3 the end of March, even after asking for a rent deferral on
4 May 16, it is still paying its rent, because there was no
5 waiver in place yet. But once a waiver was put in place, only
6 then did Frontier stop paying.

7 Though to be clear, Frontier actually continued to pay
8 rent on MSN 10038. Even while that waiver was in place, that
9 payment coming on April 16, because that was the only aircraft
10 that AMCK clearly manifested that it was excluding from the
11 waiver, and Frontier was conscious to pay that one always on
12 time.

13 Of course, we have all of those chase alerts, those
14 are at Plaintiff's Exhibit 7 and 8. Reflecting that every time
15 AMCK believed Frontier was behind by even one day, it would
16 send a chase alert, and Frontier would pay immediately. Now,
17 of course, AMCK was not sending those alerts for exactly our
18 waiver period. It sent them right before, it sends them right
19 after, but conspicuously it does not send them while we
20 understand that there is a rent waiver in place.

21 Finally, I should just say that month-to-month is not
22 a new term. These are sophisticated and smart parties, but
23 they did not invent that idea. Now, counsel says that
24 month-to-month obviously means it ends at the first month and
25 you have to talk about moving it to the next month. New York

O4H3FRO2

Summation - Mr. Schaer

1 case law says otherwise. We put this in our trial briefing,
2 I'll reiterate it here so the point is clear. New York case
3 law explains that a month-to-month tenancy has an indefinite
4 term and continues until terminated by notice. That is the
5 definition of month-to-month.

6 Now, there is a reason this well known month-to-month
7 term was used in this case. And than is because, as I alluded
8 to, the parties did not know when the next delivery would occur
9 when they agreed to it, and therefore they didn't have an exact
10 date by which to peg the waiver. They always knew it was after
11 April, but at that point, it was in the back half of May. But
12 if Frontier could move the deliveries out into June, into July,
13 the waiver would go with it. That is why they called it a
14 month-to-month, and not to the end of April, and not a one
15 month. Because it was pegged to a moving target.

16 Every act in this case manifested to Frontier clearly
17 that there was a month-to-month waiver linked to the next
18 delivery. And so long as there was no delivery, the waiver
19 continued, repayments did not need to be made, and the parties
20 still had what they wanted, which was time to complete their
21 negotiations.

22 Now, what does AMCK say about this waiver? Two main
23 things and both of which speak for themselves. The first is
24 that the parties only ever agreed to a waiver until April 21.
25 Now, for this to work, Mr. Sheridan needs to have acted

O4H3FRO2

Summation - Mr. Schaer

1 completely differently on April 6 and April 7. I was surprised
2 that counsel made a similar point in his presentation that our
3 idea is Mr. Sheridan needed to act completely different on
4 those two dates. Seemingly that he sent a follow-up e-mail on
5 April 6, but he doesn't send a follow-up e-mail on April 7, and
6 therefore it is impossible to reconcile these two things. Of
7 course, the explanation being that he didn't have the phone
8 call with Mr. Dempsey on April 6. He wasn't talking to the
9 executive on April 6, so he needed to inform him of what he
10 agreed to. But on April 7, he is talking directly to
11 Mr. Dempsey. This is executive to executive level
12 conversation. There was no need to inform Mr. Dempsey on what
13 was agreed upon, because he agreed to it with Mr. Dempsey.

14 Now, our understanding, or as they have explained what
15 happens with Mr. Sheridan -- and I'll put up our second
16 demonstrative now -- is that on April 6, Mr. Sheridan -- let me
17 try to make it a little bigger. On April 6, Mr. Sheridan felt
18 that he had the authority, felt he had the ability to get on a
19 phone call with Frontier and reach an agreement. There is no
20 dispute that that happens. And directly after he reaches out
21 to his shareholder and he leads to catch you up, and the key
22 language there being "to give us a bit of time to reach an
23 amicable agreement, we extended them a grace period of 10
24 working days on non-payment of rents."

25 So on April 6, Mr. Sheridan testifies he agrees on the

O4H3FRO2

Summation - Mr. Schaer

1 call with Frontier to give them the waiver, and then he follows
2 up with his shareholder only to say, I reached the agreement.
3 He's not asking for approval on the 6th. He is not asking for
4 permission on the 6th. He is telling the shareholder what he
5 did.

6 Now, April 7, something seems to have happened to
7 Mr. Sheridan's authority, ability, understanding of his job.
8 He has the phone call with Mr. Dempsey, where Mr. Dempsey
9 remembers they agreed, he provides a month-to-month waiver, but
10 Mr. Sheridan's testimony is that he didn't do that. Well, I
11 don't remember exactly, but I don't think I would have done
12 that. What I did is actually I had to then reach out to my
13 shareholder, and now, one day later, I need approval for these
14 types of things.

15 Now, it's curious because he uses almost the exact
16 same language that he uses on April 6. A quick update on the
17 situation with Frontier. He's not saying I need your advice, I
18 need your approval. Then again we'll go down here, the key
19 language is highlighted. In the meantime, he, meaning
20 Mr. Dempsey, "asked for us to do the deferral on a
21 month-to-month basis. They are also conscious that they don't
22 want to be in default with us. Since the next delivery isn't
23 going to be in April now that the Mobile plant is shut, I think
24 we can agree to this and give them a bit more time to work with
25 Airbus."

O4H3FRO2

Summation - Mr. Schaer

1 There is no request for approval here. There is no
2 request for permission here. There is no question mark here.
3 It mirrors exactly what Mr. Sheridan does with the shareholder
4 on April 6. Hey, this is what I've agreed to, I am giving you
5 an update on it.

6 And if there were any doubt as to what Mr. Sheridan's
7 role is, let's go to the next page of the demonstrative. This
8 is the testimony of Gerald Ma, AMCK's shareholder. And the
9 question to him, is "My question to you, sir, it wasn't the
10 idea or wasn't the idea of prepaid rent yours?" And here's his
11 answer: "no, I'm not so sure. I -- probably not. I don't get
12 into the details, I don't run the company. It's Paul was the
13 CEO. So how we -- how we negotiate, how we discuss with
14 lessees not -- not my job." That is from the shareholder.

15 Now, even countenancing Mr. Sheridan's understanding
16 that he needed to get this permission, it is then curious that
17 he never actually follows up with Frontier. He reaches out to
18 the shareholder on April 8. Each of them in their own way says
19 this is fine. One says one month, one says the month of April.
20 One says month by month. They all tie it to there being no
21 risk of delivery.

22 But Mr. Sheridan's understanding, their case, his
23 testimony is that after he gets this permission that he was
24 seeking, he then never goes back to Mr. Dempsey and says
25 anything to him ever again about this month-to-month waiver

O4H3FRO2

Summation - Mr. Schaer

1 that they discussed. That's their construct. Instead, instead
2 of Mr. Sheridan going back, their allegation is that the only
3 response they ever had between the phone call only between
4 Mr. Dempsey and Mr. Sheridan, is that Jane O'Callaghan, who is
5 not on that call, and not on this thread with the shareholder,
6 reaches out to Robert Fanning, who was also not on the April 7
7 call, and sends a draft rent deferral agreement which is
8 completely silent about the Airbus deferrals which was the
9 centerpiece of the phone call on April 7. To them, that is the
10 response to the question for month-to-month waiver tied to
11 deliveries. Again, that speaks for itself.

12 And I will say that under the law, once there is a
13 waiver, the notice of the withdrawal, which is necessary, that
14 notice must be clear, distinct, and unequivocal. It must fix a
15 reasonable time within which to act, and inform the other party
16 that failure to perform by that date will be considered a
17 default. That April 9 e-mail between Jane O'Callaghan and
18 Robert Fanning meets none of that criteria.

19 Now, also to buy this construct that Mr. Sheridan had
20 authority on one day, didn't need permission, but the next day
21 totally different, we have to ignore that throughout the end of
22 April, and into May, they met continuously to say internally
23 that the waiver is still in place. We gave them through April.
24 We have Ms. O'Callaghan's notes on an internal document that
25 they just need get back to Frontier by April 30 on the deferral

O4H3FRO2

Summation - Mr. Schaer

1 request. Not April 21, nor that it is expiring, just we need
2 to get back to them.

3 We also have to ignore all of the internal documents
4 we saw in Mr. McInerney's a bit arduous deposition video from
5 late March through May 8th, all of which say rent deferral
6 requested under negotiation.

7 And of course we have to ignore that AMCK never said
8 anything to Frontier on April 21, on April 22, on April 30, on
9 May 1st, or at any other time that called into question that
10 there was a continuing waiver, despite the parties being in
11 near constant communication. Again, the question for waiver is
12 clear manifestation and that is obvious. There was a
13 continuing waiver.

14 Now, AMCK's other main contention is that there needed
15 to be a written agreement. And that written agreement needed
16 to contain three terms. The length of the rent deferral, the
17 length of the repayment, and the interest due.

18 No one disputes that there eventually needed to be a
19 written agreement. That was always intended as far back as the
20 March 16 letter that Frontier sent. That is in fact the focus
21 of the parties' communications after April 7 when they reached
22 that month-to-month waiver. But that was also the basis of the
23 waiver. It was to give the parties time to do that
24 negotiation, which could only occur after the Airbus
25 negotiations were done, and only then reach a written

O4H3FRO2

Summation - Mr. Schaer

1 agreement.

2 And we've seen in the record a lot about Frontier
3 negotiating different terms for what would eventually be that
4 formal written agreement. We see Frontier asking for nine
5 months of a repayment period, first in its March 16 draft, and
6 then in Mr. Dempsey asking or commenting to Mr. Fanning after
7 Mr. Fanning asked about what should we do about the revised
8 agreement. They're clearly discussing the formal written
9 agreement.

10 Later we see Frontier talking about, hey, maybe we'll
11 just pay you 50 percent, 50 to 75 percent at the first
12 delivery, the remaining 25 percent at the second delivery.
13 These are just their negotiations on that formal agreement.
14 And of course we have Frontier at the end saying, forget
15 linking repayments to delivery, we will repay you right now.
16 We will repay you immediately and we will stay current forever.
17 Let's bring this negotiation to a close.

18 That was the negotiating of the eventual written
19 agreement that Frontier was trying to get to.

20 Now, we also have AMCK negotiating different terms.
21 Now, they stayed reasonably consistent with their request that
22 we just want you to pay at the next delivery. But then they
23 start adding new terms at the end such as we want significant
24 extensions on all of your aircraft to the tune of a
25 \$200 million commitment. Now, of course the difference between

O4H3FRO2

Summation - Mr. Schaer

1 the parties' negotiations is that while Frontier's continued to
2 get better, or continued to bridge the gap, AMCK's demands
3 continued to get more extreme. Which, as it turns out
4 intentionally, but unknown to Frontier at the time, kept the
5 parties from being able to finalize that written agreement that
6 Frontier was trying to get to.

7 Now, we heard some talk about the attorney letters
8 that came in after the fact. Your Honor, those are letters
9 that were drafted by counsel. They were drafted by in-house
10 counsel, they were drafted by outside counsel, none of whom
11 were involved in the actual negotiations here. Mr. Dempsey
12 couldn't answer many questions about it due to privilege. But,
13 that is just the fact. They are signed by the in-house
14 counsel, and he did testify that that's who was involved in
15 drafting them, and outside counsel. And they're clearly
16 summarizing the events that had happened over the previous
17 month and a half. And they are two to three page documents
18 that obviously cannot capture the more than 100 exhibits that
19 we have gone over in this case. But nevertheless, they clearly
20 state that Frontier understood that it was still within a
21 waiver period at the time that AMCK terminated on May 8.

22 These letters in many ways support all of the actual
23 evidence that we've seen in this case between the actual
24 players involved and the testimony that you've heard and you've
25 seen. And they certainly do not supersede any of it.

O4H3FRO2

Summation - Mr. Schaer

1 Now, how did the parties actually act? Again, we have
2 disputed material terms, so actions matter in understanding
3 those disputed material terms. They acted completely
4 consistent with the understanding that the waiver was to
5 provide time to negotiate with Airbus, and then negotiate with
6 each other. Frontier uses that time that the parties provided
7 with the waiver to immediately and tirelessly start working
8 with Airbus to move out airplane deliveries, even though it was
9 to a significant financial detriment. It was not able to
10 collect its purchase price proceeds which were about 5 million
11 per aircraft. It wasn't able to recollect its PDP refunds
12 which was about 10 million per aircraft. So it's 15 million
13 per aircraft that Frontier is pushing out at a time when it is
14 desperate for liquidity at the beginning of the pandemic that
15 the airlines are on the front lines and nobody knows how long.
16 That's what Frontier is doing.

17 And of course, it is weathering threats of default
18 from Airbus at the same time, saying if you don't show up,
19 we're going to put you in default. This is the central tenet
20 of Frontier's business. It would have ruined it.

21 What else is Frontier doing? It is communicating
22 constantly the feedback that it's getting from Airbus to AMCK.
23 It is being as transparent as possible. Hey, they'll only move
24 us to June, will that satisfy you? We'll keep working on that.
25 It is telling AMCK all the time, hey, these are the funds we

O4H3FRO2

Summation - Mr. Schaer

1 have. These are our constraints. This is what the
2 government's going to provide to us. These are when the
3 payments are going to come. It is being as transparent with
4 its business partner as possible, under that idea of the
5 waiver, to provide time to complete negotiations.

6 Now, when Frontier finally provides the exact deferral
7 months it is able to get out of Airbus, AMCK is actually fine
8 with it. Says great. We'll do three in July, we'll do two in
9 February. There is no issue on that piece. But still, without
10 an actual delivery in place during this time, there were no
11 chase alerts, there were no demands for payments, there were no
12 comments that the waiver was over, there were no comments that
13 negotiations were over. The parties continued to act as if the
14 waiver, the month-to-month waiver, was there.

15 Now what did AMCK do with its time? Let's look at
16 that and let's look at why. Now, to be clear, this does not
17 affect the central question of what AMCK clearly manifested to
18 Frontier. But it does help explain why they acted the way they
19 did, which is otherwise inexplicable.

20 Now, we have testimony, a lot of which from Gerald Ma,
21 that AMCK and its shareholder were upset with Frontier due to
22 the timing of the rent deferral request coming on the same day
23 that the first aircraft delivered. Now, of course, Frontier
24 has no control over that aircraft delivery date, which is
25 largely governed by Airbus, and was also being influenced by a

O4H3FRO2

Summation - Mr. Schaer

1 tariff regime that was being put in place at the same time, and
2 of course Frontier has no control over the pandemic, and the
3 timing of that, let alone the emergency orders that were going
4 in place just at this time.

5 But AMCK is upset about this timing, and even more so
6 its shareholder is upset about this timing.

7 We know that AMCK didn't like the terms of the
8 Framework Agreement. It says "ouch" when it sees the terms of
9 the first aircraft are going to be about 269,000, compared to
10 the 340,000 for pretty much all of the other aircraft that were
11 within its portfolio. We know they wanted out as early as
12 March 23 and March 24, already mentioning the nuclear option
13 and the MAC clause to try to not take deliveries.

14 And just a comment on the nuclear option. We've heard
15 that what the nuclear option means is that this is the last
16 option, this is not what we want to do, this is AMCK's
17 understanding, we want to do everything but avoid the nuclear
18 option.

19 Your Honor, they could have asked for payment. That
20 was an option. They could have said the waiver is over. That
21 was an option. The nuclear option that they chose was not the
22 last option, it was their preferred option to get them what
23 they wanted.

24 We also know their internal financing was drying up.
25 That the bank loan discussions for the aircraft had all been

O4H3FRO2

Summation - Mr. Schaer

1 put on hold. That the terms were getting worse and worse, and
2 that shareholder funding was likely the way that they would
3 have to move forward.

4 We know they thought, well, maybe if we can get some
5 really significant QPQs. In their terms, it cannot be normal.
6 And maybe if we can mark the Framework Agreement to the market
7 now, instead of what we actually agreed to, we won't stay in
8 the Framework Agreement. And from that comes the \$200 million
9 ask at the end.

10 We know they believed that terminating the agreement
11 with Frontier actually gave them the best chance of getting the
12 terms they wanted, that they couldn't achieve in
13 straightforward negotiations, using the crisis of their
14 termination as leverage in following negotiations. And we know
15 that they followed through on that plan to a T. That is
16 exactly what they did.

17 We also know from Mr. Sheridan's testimony and AMCK's
18 internal documents that the one thing that could ruin that plan
19 was if Frontier paid the waived rent.

20 Now, their story is built around how badly they wanted
21 to be paid, but again, they never asked to be paid. They never
22 accepted Frontier's repeated offers to pay. We will pay you
23 right now. We will pay you immediately. Because they didn't
24 want to be paid. Because they needed to not be paid. Because
25 that eventually became the pretext for their plan. And that's

O4H3FRO2

Summation - Mr. Schaer

1 why they acted the way they did and intentionally never
2 clarified or followed up on the waived rent.

3 Now thankfully for the law, and for equity, and for
4 common sense, that doesn't matter for the question of whether
5 or not there is a waiver. Again, subjective, withheld, secret
6 beliefs are irrelevant to what AMCK clearly manifested, which
7 was that there was a month-to-month waiver linked to deliveries
8 to give the parties time to negotiate with Airbus and each
9 other.

10 So, we have a waiver. Now, how do you actually
11 withdraw it? It depends on the type of waiver. There is one
12 type of waiver that is supported by consideration and justified
13 or justified reliance. Or there is a waiver that's not
14 supported by consideration or justified reliance. And the way
15 to withdraw is different depending on what you have.

16 Our waiver here is supported by consideration and
17 justified reliance. The consideration of course is the Airbus
18 piece. We are holding off on collecting \$15 million per
19 aircraft at a time when we need cash, and we are weathering
20 these threats of default from our most important partner. We
21 also have the justified reliance, of course, which is Frontier
22 thinks that it doesn't have to make these payments while being
23 incredibly conscious not to go into default with AMCK.

24 Now, it's black-letter law that of course -- this is a
25 quote -- a waiver supported by consideration or a substitute

O4H3FRO2

Summation - Mr. Schaer

1 such as reasonable and justified reliance may not be retracted
2 without mutual consent.

3 That is the law. Such a waiver, it basically forms a
4 new contract, and it cannot be withdrawn by unilateral action.
5 AMCK obviously did not have Frontier's assent, and it acted
6 unilaterally, so any withdrawal or retraction was ineffective
7 as a matter of law. Even if AMCK could withdraw it though,
8 they still needed to provide Frontier a reasonable time to
9 cure, which they did not do.

10 And that bring us to the second category of waiver,
11 the one that are not supported by consideration or justified
12 reliance. Now, if it's one of those types of waivers, a party
13 can unilaterally relinquish it or withdraw it, but to do so
14 they have to provide notice of the withdrawal, and a reasonable
15 time to pay.

16 Now, our trial brief contains scores of cases and the
17 UCC, and the New York UCC, and Williston on Contracts that
18 reinforces this basic, basic principle. Again, the withdrawal
19 must be clear, distinct and unequivocal, fix a reasonable time
20 within which to act, and inform the other party that failure to
21 perform by that date will be considered a default. There is no
22 notice like that in this case, your Honor. In fact, we know
23 that AMCK contemplated giving us that type of notice, but
24 specifically didn't because they knew we would pay. They
25 discussed this at their board meeting in April, saying we know

O4H3FRO2

Summation - Mr. Schaer

1 they'll cure if we ask them to pay.

2 Mr. Sheridan says it to Mr. Ma on May 8 before
3 actually sending the termination notice. Hey, I just want to
4 get this done before Frontier can complicate anything. Before
5 they can pay.

6 Now, at best, in the light most favorable, that May 8
7 termination letter should be construed as a notice to Frontier
8 of a withdrawal of the waiver period. But then we paid within
9 a reasonable time. We paid within three business days, which
10 is the grace period provided for in these contracts. And now
11 in these types of circumstances, courts are allowed to impose
12 what they believe are a reasonable time, and we suggest to the
13 Court that the three business day period provided already in
14 the contracts is such a reasonable time.

15 A quick note about the termination letter that they
16 sent. It only cites outstanding April rents. At that point on
17 May 8, no May rents were past the grace period. They weren't
18 the basis of their letter in any event.

19 Now, Mr. Sheridan testified that there was a rent that
20 would have been due on May 3, because there was actually one
21 that was due on April 3. That is wrong. The Court should look
22 at Joint Exhibit 192, which clearly specifies the dates, the
23 due dates for all of the payments. There was one due on
24 April 3, but that's because of the weekend and holiday
25 provision where payment is due on the prior business day. So

O4H3FRO2

Summation - Mr. Schaer

1 the first one in May was due on May 5 with a grace period
2 extending to May 8. So it was not past due when they sent
3 their termination notice. But in any event, that is irrelevant
4 because their termination notice solely is based on the April
5 rents.

6 So in sum, your Honor, there was a waiver, it was on a
7 month-to-month basis, linked to deliveries, and so long as
8 there was no delivery, the waiver continued to give the parties
9 time to first negotiate with Airbus, and then negotiate with
10 each other.

11 This waiver was supported by Frontier's consideration
12 and justified reliance. It did not expire on May 8. AMCK did
13 not have Frontier's mutual assent to withdraw it, nor did they
14 even try to give Frontier notice to withdraw it in any of the
15 many ways they could have. The opposite in fact is true. And
16 yet we still paid within a reasonable time.

17 So that bring us to damages. We heard from the
18 experts in this case, Dr. Neels and Mr. de Joung, and they
19 came to vastly different amounts. Dr. Neels calculated damages
20 at 48,660,000 as of April 8. And Mr. de Joung calculated
21 damages at about half of that, 24,950,000 as of September 21,
22 2023.

23 Now, there are three real disputes between them that
24 give rise to this significant discrepancy. The first is how to
25 even calculate the monthly rent for the replacement leases.

O4H3FRO2

Summation - Mr. Schaer

1 Now, they agree on how you calculate the CDB replacement
2 leases, the three that delivered in July.

3 The large variance however is on the two Jackson
4 Square aviation leases, the JSA ones, leading to Mr. de Jounge
5 calculating these at about a combined 72,000 less per month
6 over 144 months for two separate aircraft than the figure
7 reached by Dr. Neels, as well as Frontier and JSA themselves.

8 Now, how did he do that? Well, he says we need to
9 ignore the following items. We need to ignore Frontier's
10 understanding of how its swap rates in its contracts work. We
11 need to ignore JSA's understanding of how the swap rates in its
12 contracts work. We need to ignore how these swap rates are
13 used in these contracts. We need to ignore that swap rates
14 have historically been in the low single digits, never more
15 than 18 percent at the absolute height of inflation in the
16 1970s. And of course we need to ignore the amount that
17 Frontier has actually been paying to JSA under these leases.

18 Instead he says we need to believe that Frontier and
19 JSA intended to include assumed swap rates of 59.6 percent and
20 80 percent into their monthly rent adjustment calculation.
21 Now, this just so happens to depress the rent by 72,000 per
22 month.

23 Now what did Frontier's expert do? He doesn't ignore
24 any of that. He runs the common sense calculation with a
25 realistic swap rate based how these contracts always work, and

O4H3FRO2

Summation - Mr. Schaer

1 voila, he just so happens to reach the exact same amount that
2 Frontier and JSA reached when they did their own independent
3 calculation.

4 Now, second, the disagreement is whether to use a
5 discount rate that is debt based or WACC based. A weighted
6 average cost of capital. Mr. de Jounge says it must be the
7 WACC. Now a WACC is put in place to consider and to account
8 for the significant and ever-changing risks that are in the
9 marketplace. Stocks going up, stocks going down, interest
10 rates moving all over the place. But Mr. de Jounge admits that
11 these leases have nothing to do with that, that they are
12 inherently debt-like instruments. They are not subject to any
13 market fluctuations. The market goes up, it goes down, the
14 lease rates stay the same. Interest rates move around, the
15 lease rates stay the same. These are debt instruments. But he
16 says let's still use the WACC.

17 What does our expert say? This is a debt instrument.
18 It is a mortgage. It is a car lease. The payment is always
19 the same until it's done. Treat it exactly like it is. So use
20 the debt based rate.

21 Now, third, the third disagreement between them. What
22 is the actual discount rate to use? Mr. de Jounge says, well,
23 listen, although we ignored Frontier completely in calculating
24 their lease rates and understanding swap rates, we must only
25 listen to Frontier for their internal discount rate. And

O4H3FRO2

Summation - Mr. Schaer

1 that's 10 percent which we know really reflects an internal
2 what's called a hurdle rate or a rate at which Frontier will or
3 won't make an investment. So not what we're doing here. But
4 Mr. de Jounge says, let's actually just add 2 percent to that.
5 Because interest rates at the time I am doing my calculation
6 are higher than when I looked at this document that Frontier
7 included 10 percent.

8 Now, of course, Frontier was still using that
9 10 percent internal hurdle rate at the time Mr. de Jounge says
10 I should be using a 12 percent rate. So, once again, we have
11 Mr. de Jounge saying, well, sometimes we should completely
12 ignore Frontier, sometimes we should only listen to Frontier,
13 and coincidentally, in my selections, the damages only go down
14 significantly.

15 Now what did we do? What did our expert do? He
16 looked at a neutral third party, Bloomberg, which is the same
17 authority cited in the parties' lease agreements for swap
18 rates. And he said okay, what is Frontier's discount rate?
19 Well, its debt based rent is 1.0445 percent, and its WACC rate
20 is 1.8405 percent. That's at the time of the damages in this
21 case.

22 Now, to be sure, this is lower than Frontier's usual
23 discount rate as calculated by Bloomberg, caused in part by the
24 unique circumstances of COVID. Though, I also want to be clear
25 that the debt based rate, if you look at what's in evidence, it

O4H3FRO2

Summation - Mr. Schaer

1 stays nearly constant, it is almost always right around that
2 1 percent figure. And the WACC rate never has exceeded
3 7 percent in what we have in front of us, even in the years of
4 the highest inflation.

5 But importantly, it was also AMCK's decision to injure
6 Frontier at this specific time, in large part because of the
7 circumstances caused by this specific time. And to use the
8 crisis of this specific time as leverage to gain an advantage
9 that it is now answering for.

10 And calculating damages at the time of injury, which
11 is the accepted method, results in the rates I just discussed.

12 Now, a quick note about taxes. I promise it will be
13 quick, but I know there was a lot of testimony about it. There
14 really isn't a disagreement between the experts here. Both
15 agree that if you use the same tax rate on the front end as you
16 do the back end, you will reach the same amount in the end.
17 And that's what Dr. Neels did. Now, the reason he did this is
18 because the neutral discount rates provided by Bloomberg are
19 after tax discount rates. So to do the calculations properly,
20 you must compare apples to apples. You must apply the after
21 tax discount rate to an after tax sum of money. If you don't
22 do that, it would have actually inflated our damages. And that
23 is not something that Dr. Neels was interested in doing.
24 Accuracy was what was important. So there is no real dispute
25 on this piece of the taxes.

O4H3FRO2

Summation - Mr. Schaer

1 Now, you need to also, and finally, I should say you
2 need to also consider the taxes that Frontier will pay on a
3 damage award in order to make that whole. Now that is New York
4 law. And you can look at the *Gulino* case out of the Southern
5 District of New York, and I quote, "A tax gross-up is necessary
6 to make a claimant whole."

7 Now, Dr. Neels provided us the helpful analogy of the
8 contractor who gets stiffed on a contract for \$100,000, who
9 would have actually only ever had \$80,000 after taxes, but then
10 if you just paid him 80,000, well, he is going to pay tax on
11 that, so he'd only end up with 64,000. So therefore we need to
12 consider the taxes, and we need to pay him the 100,000 to make
13 him whole.

14 Now, our expert used 22.8 percent as the rate which
15 reflects the incremental tax effect of the next dollar that
16 Frontier receives. This matches the federal constant rate of
17 21 percent, and the state rates that are around 1 to 2 percent.
18 Now this 22.8 percent impact is the case, even if Frontier
19 shows a tax benefit in a given year, because that benefit will
20 be reduced by 22.8 percent for every next dollar. AMCK showed
21 that the effective rates have been fluctuating recently, which
22 we know is due in large part to COVID, and the financing
23 anomalies and laws that have passed with it. That has resulted
24 in some years of tax benefits for Frontier.

25 That said, the most recent year Frontier has an

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Summation - Mr. Schaer

1 effective tax rate for is 2023, and that is at 134.4 percent.
2 Of course we are not advocating that the Court should apply a
3 134.4 percent tax rate to the damages in this case. We are not
4 saying the Court needs to more than double the actual damages.
5 That would be absurd. What we are saying is to use the real
6 world, common sense, actual rate that Frontier will pay on the
7 damages award, which would be 22.8 percent.

8 So, in the end, then, when you use the appropriate
9 lease rates, the appropriate discount rates, and the
10 appropriate tax rates, it results in an award of
11 \$48.66 million.

12 Your Honor, this case, as I stated at first, is about
13 time. The parties entered a waiver because they wanted time
14 before deliveries, time before paying rent, and time to
15 negotiate both of those deals. So, they provided a waiver on a
16 month-to-month basis linked to the next delivery to accomplish
17 those tasks. With its time Frontier did exactly what it said
18 it would, at a significant cost to its business.

19 And in turn with its time, AMCK and its shareholder
20 began to scheme ways to get out of the Framework Agreement that
21 it was already looking to terminate. Calling the nuclear
22 option, using the MAC, way back in March while there is no
23 dispute that Frontier was fully paid.

24 Now, after a waiver was created, AMCK intentionally
25 never said anything that would call it into question, because

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1 if it did, and Frontier paid, like AMCK knew it would if it was
2 ever asked, AMCK's plan would be ruined.

3 As a matter of fact, and as a matter of law, that is
4 wrong. The Court should therefore return a decision of
5 48.66 million in Frontier's favor.

6 Now, before I sit down, I want to mention the time
7 theme one last time. We want to thank the Court for its time
8 and its patience while we've presented the robust factual
9 record in what, as your Honor noted, is really a
10 straightforward case.

11 Thank you.

12 THE COURT: Thank you, Mr. Schaer. I have one
13 question for you. The 22.8 percent, if Frontier was making
14 that on its business in normal course, at the end of the day,
15 it would be taxed and nobody would reimburse it for that tax.

16 MR. SCHAER: That's correct, your Honor. That's as I
17 understand it, though.

18 THE COURT: Therefore, why now that it gets the money,
19 why should it be reimbursed for the tax? Why shouldn't it
20 simply get the amount of money as though it had earned it under
21 more peaceful circumstances?

22 MR. SCHAER: You know, I don't know if I fully
23 understood the question, though I do think how the calculation
24 is done, is that if Frontier had a certain amount of money at a
25 given point, that money had already been taxed. And now it

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1 doesn't have that, and so to then compensate it for that, well,
2 that compensation is going to be taxed again. And so we would
3 actually bring it lower than what Frontier actually had in
4 the -- I think it is the but-for world as Dr. Neels said. So
5 to get us to that but-for world, where Frontier actually ends
6 with the same amount of money that it would have had, we need
7 to consider the taxes it's going to pay on the compensation
8 award.

9 Again it goes back to that double tax theory I believe
10 that Dr. Neels explained with the contractor, where he has a
11 contract for 100,000, but he would have paid 20 percent taxes
12 on it. So, the contractor only would have 80,000. Now, if the
13 defendant in that case says I should only be liable for 80,000,
14 and the contractor gets paid 80,000, well, then the contractor
15 is going to have to pay taxes on that 80,000, so he is going to
16 be left with 64,000. So that's why when you say all right,
17 contractor, I know you only would have ended with 80,000, but
18 we need to consider the taxes that you would pay in order to
19 get you down to 80,000. So, consider your taxes, in that case
20 it was 20 percent, the damage award is 100,000, which the
21 contractor pays 20 percent on, and then he or she would then be
22 left only with 80,000, the same position he or she should have
23 been in, and that's what would make the contractor whole. I
24 hope that makes sense.

25 THE COURT: I think simply that I should not be

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1 allowed to discuss taxes. But I don't understand where the
2 concept of double taxation comes in. It seems to me it would
3 have paid one tax under normal conditions.

4 MR. SCHAER: That's right.

5 THE COURT: But it didn't get that money, therefore it
6 was not taxed on that money. And now it does get that money,
7 and therefore, it pays a tax on it. And it seems to me that
8 they're two single processes.

9 MR. SCHAER: You know, I absolutely understand the
10 Court's concern. I echo the Court's caution that I should not
11 be talking about tax much more than I do know. If your Honor
12 would like some supplemental briefing to further explain this
13 issue, we are happy to provide it.

14 I believe that Dr. Neels also attempted to really
15 clarify this in his declaration, but we're happy to give -- I
16 understand the Court's question, and to give it a targeted
17 accurate response, we're happy to provide that.

18 THE COURT: Okay. I appreciate your addressing that
19 point. And do it with the thought that it must be explained in
20 terms that you would use if you were explaining it to a rather
21 slow child.

22 MR. SCHAER: It will be --

23 THE COURT: Okay.

24 MR. SCHAER: -- absorbed that way as well, your Honor.

25 THE COURT: Thank you all.

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1 Do you want to file briefs or do you regard that as
2 having been covered?

3 MR. BUTLER: Your Honor, I don't believe we intended
4 to submit post-trial briefs, especially with the summations
5 that we've done. If the Court would find post-trial briefing
6 valuable, of course we would be happy to do it.

7 THE COURT: I have asked the questions that gave me
8 pause as I read your submissions. And if you could address
9 those two questions, I would appreciate it.

10 MR. BUTLER: Certainly.

11 THE COURT: Beyond that, I don't think we have any
12 need for a general discussion of the case.

13 MR. BUTLER: Your Honor, can --

14 THE COURT: We have it pretty well in mind.

15 MR. BUTLER: Can we confer and propose a briefing
16 schedule for that, those submissions?

17 THE COURT: Sure.

18 MR. BUTLER: Thank you, your Honor.

19 THE COURT: Sure.

20 MR. SCHAER: Thank you, your Honor.

21 THE COURT: Don't overdo it. Short, brief,
22 comprehensible answers on those points, I think we would
23 appreciate. But we're not trying to conduct a legal seminar on
24 either of them. Okay.

25 MR. BUTLER: Thank you, your Honor.

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1 MR. HOSENPUD: Thank you, your Honor.

2 THE COURT: Thanks a lot.

3 (Adjourned)

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